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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1944

No. 966

R. BERNARD DICKEY,
*Petitioner,*

vs.

RAISIN PRORATION ZONE No. 1, a proration zone organized under the laws of the State of California, et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California.

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## PETITION FOR WRIT OF CERTIORARI
## to the Supreme Court of the State of California.

*To the Honorable Harlan Fiske Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:*

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of California, in the case therein numbered L. A. No. 18,573, and entitled, "R. Bernard

Dickey, Plaintiff and Respondent vs. Raisin Proration Zone No. 1, a proration zone, etc., et al., Defendants and Appellants".

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**FOREWORD.**

Petitioner's property (40,494 pounds of raisins) was taken from him, without his consent and without compensation, and pledged as security for the debts of his neighbors. By a 4 to 3 vote, the California Supreme Court upheld this peculiar and unprecedented pledge transaction, and held it to be authorized by a California statute which did not even mention such a transaction, or anything remotely resembling it.

In so deciding, the California Supreme Court reversed a contrary ruling of the Fresno County Superior Court, adjudging this transaction to be wholly unauthorized and invalid, which conclusion of the Superior Court had been unanimously approved by the California District Court of Appeal before the Supreme Court took over the case.

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**STATEMENT OF CASE.**

This case arose under the California Agricultural Prorate Act (Cal. Stats. 1933, p. 1969), adopted in the depression year 1933 to provide a solution for agricultural overproduction, and its consequent market demoralization. This statutory solution consists of the formation of so-called proration "zones" to control and regulate the marketing of agricultural crops in

years of crop surplus. The essence of this statutory plan is that the "surplus" portion of a given crop is temporarily taken off the market and impounded with a proration "zone" set up to handle that particular type of crop. All the growers are compelled by law to deliver to the "zone" the "surplus" portion of their crop (a given percentage determined each year by the zone officials). This surplus is thus kept off the current markets and consequently does not demoralize them. The zone is supposed to hold and dispose of said "surplus" as agent for the contributing growers, and for their account.

**RAISIN PRORATION ZONE NO. 1.**

In 1938, some eight thousand raisin growers in California, including petitioner, were compelled by a raisin proration program set up under this statute, to deliver 20% of their 1938 raisin crop to Raisin Proration Zone No. 1. This 20% was the "surplus" portion of the crop, and was to be impounded with the zone in accordance with the Prorate Act. The other 80% of the crop was the so-called "free" tonnage, that is, the portion which could be safely marketed in the current channels of trade without unduly depressing the market. The grower was privileged to do what he pleased with this 80% portion of his crop.

Petitioner (as his 20%) delivered some 40,494 pounds of raisins to this "stabilization" or "surplus" pool of the zone. Later, when he and certain fellow growers investigated to ascertain what had become of these "stabilization pool" assets, they learned that

Commodity Credit Corporation claimed a pledge lien on these raisins.

**PURPORTED PLEDGE TO COMMODITY CREDIT CORPORATION.**

Commodity predicated its claim to these raisins upon the following transaction. In 1938 the officials of this Raisin Proration Zone No. 1 worked out a rather complicated deal whereunder any raisin grower could borrow, in individual loan transactions and on non-recourse loans, from the Raisin Proration Association (a private corporation set up by the officers of this Raisin Zone as an instrumentality of the zone), $50.00 a ton on their "free" (i.e., 80%) raisins. The funds to make these private loans were obtained by Raisin Proration Association from Commodity. Such borrowing growers, in addition to executing their personal notes to evidence such loans, were required to specifically pledge, as security for this debt, not only their "free" tonnage (80%) but also their interest in the stabilization pool raisins (i.e., 20%). The zone officials also undertook to pledge to Commodity, as further security for these individual loans to growers, *all* the raisins in the "stabilization pool" of the zone, including the raisins delivered to that pool by petitioner and some four thousand other growers who did not elect to borrow on their raisins. (R. 41.) In short, Commodity claimed to hold, under this last mentioned pledge, all of the raisins of the "surplus" pool, even though almost half of the growers contributing to that pool borrowed nothing on their raisins.

The validity of this pledge is the basic issue in this case.

HISTORY OF THIS LITIGATION.

Shortly after becoming aware that Commodity thus claimed these raisins, petitioner instituted this litigation in the Superior Court of the State of California, in and for the County of Fresno, to enjoin the Raisin Proration Zone No. 1 and Commodity from consummating this pledge transaction. (R. 1.) That Court, after due consideration of the matter (on exhaustive briefs and other presentation) rendered judgment (pursuant to motion by plaintiff for judgment on the pleadings) that this purported pledge transaction was not authorized by the Prorate Act, and was illegal; and granted to petitioner the relief sought by him in behalf of himself and his fellow growers. (R. 87.)

The zone and Commodity appealed from this judgment to the District Court of Appeal of the State of California, Fourth Appellate District. That Court, by unanimous decision, upheld the Superior Court's conclusion that this pledge transaction was not at all authorized by the Prorate Act, and was invalid:

> "We must hold that the transaction we have described * * * was unauthorized by any express or implied powers granted by the Agricultural Prorate Act. * * *
>
> "None of the powers assumed and used in this complicated transaction were necessary to carry out the inherent or express powers granted by the act and it would be judicial legislation of the worst kind to hold that those powers were granted by implication." (140 P. (2d) 53, 65.)

However, on certain technical grounds arising out of the pleadings (estoppel, etc.), the District Court of

Appeal reversed the judgment of the Superior Court and remanded the case for further proceedings in the Superior Court covering these technical points.

Thereafter, the California Supreme Court, on application of Commodity, granted a hearing in that Court, and ultimately, on August 31, 1944, rendered a decision (R. 99) to the effect that this pledge transaction was valid, and authorized by the Prorate Act. (Four justices concurred; three dissented.)[1] The Supreme Court not only reversed the judgment of the Superior Court, *but ordered the latter Court to dismiss the case.* (R. 116.)

It is conceded by all (as it must be) that nowhere in the Prorate Act was there any mention of such a transaction as that involved in this case, nor any language expressly authorizing any such transaction. The majority of the Supreme Court, however, arrived at the conclusion that the power to make this pledge could be read into the statute under the doctrine of "implied statutory powers".

On September 15, 1944, petitioner duly petitioned the California Supreme Court for a rehearing, which was within the time allowed by California law. This petition was denied on September 28, 1944, with three justices voting for a rehearing.

Petitioner has thus exhausted his remedy in the California Supreme Court, the highest State Court.

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[1]In short, of the twelve judges who gave due and careful consideration to this important case (two Superior Court judges, three Appellate Court justices, and seven Supreme Court justices), eight were firmly of the view that this novel and peculiar transaction was wholly unauthorized and illegal; the other four, however, constituted the majority of the California Supreme Court.

Within three calendar months from the date of denial of said petition for rehearing, and on December 6, 1944, the United States Supreme Court granted an extension of time to January 20, 1945, for the filing of this petition for certiorari and supporting brief and record; thereafter, on December 30, 1944, this Honorable Court further extended said filing date to February 15, 1945; thereafter, and on February 8, 1945, this Honorable Court further extended said filing date to February 20, 1945.

While petitioner sincerely feels that the construction placed by the majority opinion of the California Supreme Court upon this statute does violence to, and contravenes, all settled principles of statutory construction, he will limit himself herein to an attempt to show this Honorable Court that, *as thus construed by said Supreme Court,* this California statute is unconstitutional because it violates the Fourteenth Amendment to the Constitution of the United States, by taking petitioner's property without due process of law and by denying him equal protection of the laws. It is well settled that an otherwise valid state statute may be rendered violative of the Fourteenth Amendment by a judicial construction thereof:

> "The violation is none the less clear when that result" (i.e., denial of due process) "is accomplished by the state judiciary in the course of construing an otherwise valid state statute." (*Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 680, 50 S. Ct. 451; *Ouncby v. Morgan,* 256 U. S. 94, 65 L. Ed. 837.)

## JURISDICTION OF THIS COURT.

The jurisdiction of this Honorable Court is invoked under Section 237(b) of the Judicial Code, which reads as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State * * * where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, * * * of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * * of the United States * * *." (28 U.S.C.A. § 344, Par. (b), p. 206.)

## THE FEDERAL QUESTION.

Petitioner claims that if the Prorate Act is to be construed as authorizing the pledge transaction involved in this case, said statute is unconstitutional and void under the Fourteenth Amendment to the Constitution of the United States, because:

(1) It involves a taking of petitioner's property without due process of law;

(2) It denies to petitioner the equal protection of the laws.

**THE TIME AND MANNER OF RAISING THE FEDERAL QUESTION.**

The Superior Court so construed this statute as to obviate any question as to its constitutionality. The California District Court of Appeal did likewise. The question as to its constitutionality first arose because of the construction placed upon this statute by the California Supreme Court. When that Court so construed this legislation as authorizing this pledge transaction, that Court, for the first time in the history of this litigation, exposed the statute to this charge of unconstitutionality. When the Supreme Court thus interpreted the statute in a manner contrary to the construction placed upon it by the two lower Courts, petitioner promptly petitioned the Supreme Court for a rehearing, and in his petition[2] emphasized that this construction thus adopted by the Supreme Court would render the statute violative of the Fourteenth Amendment to the federal Constitution, because it would involve both a taking of petitioner's property without due process of law and also result in a denial to him of equal protection of the laws.

The California Supreme Court, in passing upon this petition for rehearing, considered and passed upon and rejected this constitutional contention of

[2]Inasmuch as only a part of the petition for rehearing filed in the California Supreme Court is printed in the transcript of record herein (R. 120), we have, at the suggestion of the clerk of this Honorable Court, printed it in full as an appendix to our brief filed herewith. A complete copy thereof, duly certified by the clerk of the Supreme Court of the State of California, is, of course, on file in the United States Supreme Court in this case.

petitioner. (See Certificate of Chief Justice of the California Supreme Court, Appendix to Brief, p. i.)

Under the foregoing circumstances, there can be, we respectfully submit, no question but that the federal question was raised in a timely manner and that the proper federal jurisdictional predicate is present in this case. (Brief, p. 2.)

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**PRORATE ACT, AS CONSTRUED BY CALIFORNIA SUPREME COURT, VIOLATES FOURTEENTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES.**

**Summary Statement.**

Petitioner alleges and respectfully submits that the Prorate Act, as thus construed by the California Supreme Court, violates the Fourteenth Amendment, because:

I. THIS PLEDGE TRANSACTION TOOK PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW, BECAUSE:

A. IT WAS NOT A PROPER EXERCISE OF POLICE POWER, BECAUSE:

1. It was not necessary to promote or protect the public welfare, morals, health, or safety, because:

a. It was not in any manner a part of the stabilization plan authorized by the Prorate Act. (Infra, p. 13.)

b. It was not at all necessary to the achievement of the legitimate objec-

tives of this statutory stabilization program. (Infra, p. 14.)

c. This pledge transaction was and is fundamentally inconsistent with the basic spirit and purpose of the Prorate Act in at least two important respects. Firstly, it exposes the stabilization pool raisins to competition with the "free" raisins. (Infra, p. 17.) Secondly, it involves an unlawful delegation by the Zone officials of their fiduciary duties. (Infra, p. 19.)

2. This transaction went far beyond merely restricting or limiting petitioner's property rights; it entirely confiscated them, allegedly for the public use and benefit. Such a "taking" cannot be justified under the police powers. (Infra, p. 19.)

B. THIS TAKING OF PETITIONER'S PROPERTY CANNOT BE JUSTIFIED AS A TAKING UNDER EMINENT DOMAIN FOR THE PUBLIC USE AND BENEFIT, BECAUSE:

1. No compensation was paid petitioner.

2. No hearing was afforded to fix or determine compensation.

C. THIS PLEDGE TRANSACTION AMOUNTED, IN ESSENCE, TO THE TAKING OF PETITIONER'S PROPERTY FOR THE PRIVATE BENEFIT AND USE OF HIS NEIGHBORS, WITHOUT HIS CONSENT AND WITHOUT COMPENSATION.

II. This Loan and Pledge Transaction Denies to Petitioner Equal Protection of the Laws Because It Imposes Upon Petitioner's Legitimate Business and Property Various Unnecessary and Unreasonable Restrictions, Liabilities and Impairments Not Imposed Upon Other Similar Businesses and Properties.

We will now briefly amplify these several salient points. In our accompanying brief we will present a fuller discussion of the supporting legal authorities.

---

**I. THIS PLEDGE TRANSACTION TOOK PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW, BECAUSE:**

**A. IT WAS NOT A PROPER EXERCISE OF THE POLICE POWER, BECAUSE:**

**1. It Was Not at All Necessary to Promote or Protect the Public Welfare, Morals, Health, or Safety.**

It is, of course, well settled that a plan or program authorized by a statute, which materially restricts or impairs private property rights, cannot be justified under the "police power" unless it appears that such plan is necessary to promote the public welfare, health, morals or safety; and that the method or means employed to accomplish the public objective must be reasonable; and the statutory plan must not go beyond the necessities of the case. (Brief, p. 4.)

When judged by these settled standards, this loan and pledge transaction involved in our case is, we respectfully submit, wholly unjustifiable under the "police powers".

**(a) It was not in any manner a part of the stabilization plan authorized by the Prorate Act.**

The stabilization plan authorized by this statute, to protect agricultural markets against crop overproduction, consists simply of the withdrawal of the "surplus" portion of the crop from the current markets by impounding it with the zone as trustee for the contributing growers. This is fully sufficient to, and it does, accomplish the statutory objective of market stabilization. This is the only proration plan authorized or contemplated by the statute.

In 1938, the Program Committee of the Raisin Zone, after a study of all pertinent data and factors, concluded and determined that 80% of the 1938 raisin crop could be allowed to go to market unrestricted in time or volume, without in any way jeopardizing or glutting the markets. It thereupon formally put into effect the 20% proration plan above mentioned.

The withdrawal of this 20% from the current channels of trade was all that was necessary to, and it did, stabilize the market for that season. The California District Court of Appeal well epitomized this:

> "We can see nothing obscure, uncertain or ambiguous in the language used in the Agricultural Proration Act. Its purposes are clearly set forth. They are to stabilize the market price of an agricultural product by withholding from the market the surplus portion of the crop that cannot be marketed without crowding the market price below the cost of production." (140 P. (2d), at p. 64.)

This loan and pledge transaction was not in any manner a part of this proration plan. The statute says nothing about any such scheme. This significant omission alone effectively refutes any claim that this pledge was a necessary part of the police-power program authorized by the statute. If, as the California Supreme Court assumes, this loan and pledge program was so necessary to accomplish the legitimate objectives of this statute, why did not the California Legislature so declare? If it had considered such a scheme necessary, it no doubt would have meticulously and expressly provided for it. Police power is, of course, a function of the legislative branch, not the judiciary.

**(b) This loan transaction and pledge was not at all necessary to the attainment of the legitimate objectives of this statute.**

Any claim that this loan or pledge transaction was necessary to achieve the stabilization authorized by this statute is clearly unsound. This is true for several reasons.

Said pledge transaction was not necessary in order to keep the 1938 raisin "surplus" off the market because this was achieved by the mandatory 20% proration plan.

It was not necessary to prevent a market demoralization. This was accomplished by the 20% proration plan.

Nor was this loan and pledge transaction necessary in order to protect the market against the "free" (i.e., 80%) portion of the crop. This, we believe, is self-evident. The market did not need protection against

this portion of the crop. The market was able to absorb all that portion of the crop without undue strain or demoralization. This fact was carefully and officially determined by this Raisin Zone in the discharge of its proration duties under this statute. (Brief, p. 13.) That is why it ordered proration of only 20% of the crop.

Any assumption or statement that this pledge transaction (or any other scheme) was necessary to protect the 1938 market against the "free" portion of the crop is, we respectfully submit, patently illogical and unsound. The very idea of this proration plan was that the growers would be free to market their "free" raisins at any time and in any manner they choose. In short, the market needed no protection against the "free" portion of the crop.

Furthermore, such a withdrawal plan and program is the furthest point to which such a plan can constitutionally go. It cannot and should not go beyond the necessities of the case. The loan and pledge transaction aforementioned went far and remotely beyond any public necessities in this case.

**Even if a loan program had been necessary, this pledge was not.**

Moreover, and entirely apart from the foregoing, and assuming simply for sake of argument that a program of private *loans* to growers was needed in 1938 to keep them from "dumping" their "free" raisins on the market (this is not true), it is very clear that such a *loan* program could have been arranged for the powers without resorting to the un-

precedented and indefensible procedure of hypothecating Mr. Dickey's property to secure his neighbors' debts. In short, even if such individual loans had been necessary to protect the public welfare, *this particular pledge transaction certainly was not.* If certain (or many) necessitous growers had needed personal financing to enable them to carry their "free" raisins until they could take advantage of the market's fluctuations to sell at the "peak", they could have, and should have been supplied with such financing on the security of their own raisin holdings. In fact, just such financing has been provided in other years with government funds even when there was no zone or proration plan in effect. It is significant, however, that in said other years the loan plans did not involve any attempt to pledge one grower's raisins to secure his neighbor's debts.

Any attempt to answer the foregoing by claiming that Commodity without the security of these stabilization pool raisins would not have loaned the borrowing growers as much per ton as was loaned in 1938, not only is immaterial, we respectfully submit, but it serves to further demonstrate and confirm the petitioner's position herein because it shows that his property was taken and used to enable his neighbor to borrow more on his crop.

Incidentally, it should be noted that *the basic premise* of the majority opinion in the California Supreme Court is this very assumption that this loan and pledge transaction was necessary in 1938 because:

> "Without available financial support many of the growers would have been compelled by eco-

> nomic necessity to throw their 'free' crops on the market as soon as possible, thus causing a collapse in prices." (R. 109.)

This factual assumption by the California Supreme Court is entirely unsupported by any evidence or other competent support in the record. Moreover, it is contradicted by the record in this case consisting of the official findings and formal declarations of the Raisin Proration Zone No. 1 when it put into effect this 1938 proration program. (Brief, p. 14.) Furthermore, the making of this basic factual assumption by the Court without giving petitioner an opportunity to produce evidence with respect to said important issue of fact is, in and of itself, a serious denial of due process of law. (Brief, p. 15.)

Equally unsupported, but even more surprising, is the majority assumption that the basic purpose of the Prorate Act is that of enabling these zone officials to so juggle and manipulate agricultural marketing as to enable the farmers to secure from the purchasing public "maximum economic returns". (Brief, p. 19.)

**(c) This pledge transaction is fundamentally inconsistent with the spirit and purpose of the Prorate Act, because:**

**(aa) It exposes the "surplus" raisins to competition with the "free" portion of the crop.**

A pledge invites a pledge sale, which in turn necessarily connotes an opportunity for the pledged article to freely enter the channels of trade. Thus, if the "implied" power to hypothecate these stabilization pool raisins is once conceded, the fundamental object

of the Prorate Act (i.e., keeping these raisins out of the channels of trade) is jeopardized and can be defeated. Justice Schauer, in his able dissenting opinion in the California Supreme Court, succinctly summed up this phase:

> "In the light of the scrupulous care and particularization shown by the Legislature in limiting the power of the committee relative to disposal of the surplus so as to guard against adversely affecting the market for the free crop, it was not reasonable to assume that in the same act the Legislature intended to give the committee unbridled power to hypothecate that surplus *and so subject it to the possibility of forced sale in direct competition with the free crop.*" (Italics are Justice Schauer's.) (R. 119.)

It is no answer to this to state that such a pledge sale has not occurred, or would not occur, or might in some way be circumvented. It is settled that in testing the constitutionality of a statute or a transaction thereunder, the criterion is what could be done pursuant thereto, and not necessarily what has been done:

> "What may reasonably be done under a statute is the test of its validity." (*Abbott v. McNutt,* 218 Cal. 225, 230.)

> "The supreme test of the validity of any such law is not what may have been done under it; not, as here, what the contracting parties may by convention agree to do or not to do under it, but it is what may be done under it. (Lewis' Sutherland on Statutory Construction, sec. 107.)" (*City of Los Angeles v. Lewis,* 175 Cal. 777, 783.)

**(bb) Under the Prorate Act the Zone is charged with the important fiduciary duty of controlling and disposing of the stabilization pool raisins for the benefit and account of the growers. Under this pledge this important trust duty is delegated to strangers.**

The Prorate Act expressly confers and enjoins upon the Program Committee of the zone the very important and fiduciary power and duty of controlling and disposing of the stabilization pool raisins, including the duty of marketing these surplus crops to the best advantage of the growers, when and if this can be done without unduly depressing the market. The pledge transaction involved in this case is directly inconsistent with this phase of the act. It involves an improper abdication and delegation of this fiduciary duty because it vests in strangers to this zone this important power of controlling the disposition of these trust assets. (Brief, p. 25.)

**2. This Transaction Went Far Beyond the Point of Merely Restricting or Limiting Petitioner's Property Rights; It Entirely Confiscated Them Allegedly For the Benefit of the Public.**

That this litigated pledge transaction involves an actual and complete taking of petitioner's 40,494 pounds of raisins is, of course, indisputable.

When a statutory plan or program does not merely undertake to regulate, restrict or control private property, but actually takes it away from the owner, allegedly in the public interest, it is the rule, at least in the case of property which is harmless and innocuous *per se*, that "police power" vanishes and the doctrine of eminent domain enters and controls. This Honorable Court, speaking through Justice Holmes,

enunciated this principle in the leading case of *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 67 L. Ed. 322, 43 Sup. Ct. 158:

> "The general rule at least is that while property may be regulated to a certain extent if regulation goes too far it will be recognized as a taking." (260 U. S., at p. 415.)
>
> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the action." (260 U. S., at p. 413.)

**B. THIS TAKING OF PETITIONER'S PROPERTY CANNOT BE JUSTIFIED AS A TAKING UNDER EMINENT DOMAIN FOR THE PUBLIC USE AND BENEFIT.**

**1. No Compensation Was Paid Petitioner.**

It is undeniable that no *direct* compensation was paid petitioner for these raisins taken from him, allegedly for the public benefit.

Any claim that this transaction can be justified under eminent domain on the theory that petitioner was compensated by the alleged "benefit" accruing from this transaction to his "free" tonnage is legally unsound, as well as specious. In the first place, if the

"free" raisins were enhanced in value it was because of the withdrawal of the "surplus" 20% from the market, and not because of this pledge transaction. Secondly, if it is claimed that this pledge transaction kept other growers from "dumping" their "free" raisins on the market and "collapsing" the price structure, and hence petitioner was thus benefited, such a claim is both factually unsupported (see p. 17, supra; also Brief, p. 12) and is untrue. It is untrue because such a "dumping" would have been a distinct benefit to petitioner instead of a calamity. Petitioner, a substantial grower, could, and customarily did, hold his raisins for extended periods of time. The 1938 market was able to and did absorb all the 80% portion of the crop. The Zone officials knew and officially declared that it could do this. In short, the market (i.e., the public) needed these raisins and absorbed them. Consequently, if the absence of this loan and pledge transaction would have meant that many growers would have "dumped" their "free" raisins and collapsed the *then* price structure (which is not at all true) so much the better for petitioner. After the market had absorbed these "jettisoned" raisins, the price for his "free" raisins would have, of necessity, been a more advantageous one.

But entirely apart from the foregoing, it is clear that such alleged "benefits" as those mentioned in the preceding paragraph fall into the category of indirect, speculative and conjectural benefits. It is well settled that such alleged benefits play no part in the law of eminent domain.

"Benefits which are remote, contingent and speculative cannot be considered." (*Baumann v. Ross,* 167 U. S. 548, 42 L. Ed. 270, 17 S. Ct. 966; *Columbia Heights Realty Co. v. Rudolph,* 217 U. S. 547, 54 L. Ed. 877, 30 S. Ct. 381; *Kennedy v. Indianapolis,* 103 U. S. 599, 26 L. Ed. 550.)

**2. No Hearing Was Afforded to Fix or Determine This Compensation.**

Due process of law in eminent domain requires, as an indispensable requisite, that in order that compensation may be fixed, and in order that the extent of any offsetting benefits may be definitely determined, a formal hearing must be had so that the exact monetary value of the property taken and of the alleged benefits to the remaining property may be adjudicated. (18 *Am. Jur.,* p. 965, § 322; 29 *C. J. S.,* p. 904, § 100; *North Laramie Land Co. v. Hoffman,* 268 U. S. 276, 69 L. Ed. 953, 45 S. Ct. 491; *Bragg v. Weaver,* 251 U. S. 57, 64 L. Ed. 135, 40 S. Ct. 62.)

It is indisputable that no such hearing was afforded petitioner in this case.

**C. THIS PLEDGE TRANSACTION AMOUNTED, IN ESSENCE, TO THE TAKING OF PETITIONER'S PROPERTY FOR THE PRIVATE BENEFIT AND USE OF HIS NEIGHBORS, WITHOUT HIS CONSENT AND WITHOUT COMPENSATION.**

When this entire loan scheme and pledge is stripped of all its verbiage and circumlocution, it will be seen, we respectfully submit, that the above stated appraisal is fair and accurate. Such schemes have been consistently condemned by this Honorable Court from earliest times, viz.:

"The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another is not due process of law, and is a violation of the fourteenth amendment of the Constitution of the United States. *Wilkerson v. Leland,* 2 Pet. 627, 658; *Murray v. Hoboken Co.,* 18 How. 272, 276; *Loan Association v. Topeka,* 20 Wall. 655; *Davidson v. New Orleans,* 96 U. S. 97, 102; *Cole v. La Grange,* 113 U. S. 1, 5 Sup. Ct. 416; *Fallbrook Dist. v. Bradley,* 164 U. S. 112, 158, 161, 17 Sup. Ct. 56; *State v. Chicago, M. & S. P. Ry. Co.,* 36 Minn. 402, 31 N. W. 365." (*Missouri Pacific Ry. Co. v. State,* 164 U. S. 403, 417, 17 Sup. Ct. 130.)

---

**II. THIS LOAN AND PLEDGE TRANSACTION DENIES TO PETITIONER EQUAL PROTECTION OF THE LAWS BECAUSE IT IMPOSES UPON PETITIONER'S BUSINESS AND PROPERTY VARIOUS UNNECESSARY AND UNREASONABLE RESTRICTIONS, LIABILITIES AND IMPAIRMENTS NOT IMPOSED UPON OTHER SIMILAR BUSINESSES AND PROPERTIES.**

It cannot be disputed that petitioner is engaged in a lawful business and that this property of which he has been deprived is legitimate and harmless. In fact, as a farmer, petitioner is a member of a class which, by its arduous labors, its large investments and its incessant gambles with nature and other factors, has contributed very materially to the upbuilding of our country.

Why should petitioner be burdened with the liabilities and property impairments which this disputed pledge transaction entails, when his fellow citizens in

other equally important businesses and industries are not thus burdened?

For all of the reasons set forth earlier in this petition, this pledge program involved in this case, resulting as it did in a complete taking of petitioner's property, was and is highly discriminatory, unreasonable and unnecessary. It therefore contravenes the basic constitutional prohibition against denial of equal protection of the laws.

> "Police regulations equally with other laws are subjected to this prohibition." (12 *C. J.*, p. 1144, § 878.)
>
> "But we cannot at all agree that a police regulation is not, like any other law, subject to the 'equal protection' clause of the 14th Amendment. * * * The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation. It does not prevent classification, but does require that classification shall be reasonable, not arbitrary, and that it shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation." (*Atchison T. & S. F. Ry. Co. v. Vosburg,* 238 U. S. 56, 59 L. Ed. 1199, 35 S. Ct. 675.)

No valid or reasonable basis of classification underlies the discriminations which this pledge transaction works against petitioner and his fellow non-borrowing growers. Assuming, simply for sake of argument, that a loan program might have been essential in 1938 to assist the needy growers in holding their crops for the

"right price", certainly there is no reasonable basis for saying that, in order to assist them in getting such personal financing, their neighbors' property could be used as further security for such loans. Such financial assistance could have, and should have, been predicated on the "borrowers" property and not that of the "non-borrowers". In short, this discrimination against the non-borrower is utterly unnecessary, unreasonable and arbitrary.

Before concluding, petitioner wishes to emphasize two things in connection with the foregoing discussion of this raisin program and its relation to the police power.

The first is that petitioner is not asking this Honorable Court to forbid or vitiate the basic proposition of protecting agricultural markets from collapse or serious demoralization by regulating, under reasonable statutory proration plans, the flow of crops to market in years of crop surplus. He does ask this Honorable Court, however, to prevent these salutary programs and objectives from being corrupted and perverted by such unfair, unnecessary and discriminatory schemes as the pledge transaction which is sought, by a doctrine of "implied power", to be engrafted on the Prorate Act in this case. This anomalous scheme is, we believe, just the type of improper invasion of property rights which the venerable Justice Holmes had in mind when he warned:

> "When this seemingly absolute protection is found to be qualified by the police power, the

> natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." (*Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 415.)

The second thing which petitioner desires to stress is that it should be remembered in all of this that, basically, the *only* constitutional justification for the imposition of these marketing proration programs is that the particular type of agricultural industry in question (lemons, raisins, etc.) is of sufficient importance to the public economy that its ruin by market collapse would cause serious injury to the public economy. This basic criterion fits, of course, a great many industries, not only in the agricultural field, but in numerous other fields of business and industrial activity, many of which are far more important to the state and national economy than the raisin industry. For these reasons, the precedent established by the decision of the California Supreme Court in this case far transcends, in its importance, the mere property, parties or even the industry involved in this cause.

> "A wrong decision does not end with itself. It is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other." (261 U. S., at 561.)

**REASONS FOR GRANTING WRIT OF CERTIORARI.**

Petitioner respectfully submits that the issuance of the writ prayed for herein is justified, because:

1. He has been unlawfully deprived of his property by a state statute contrary to the Fourteenth Amendment; he has exhausted his efforts to secure relief in the State Courts; and now turns, as his last resort, to the Honorable Supreme Court of the United States, the citadel of constitutional protection.

2. The unlawful impairment and deprivation of property rights sanctioned by the California Supreme Court in this case is so drastic and dangerous a precedent as to warrant and require the intervention of this Honorable Court.

3. To say the very least, the problems of constitutional law to which this novel and peculiar transaction in this case give rise are of sufficient gravity and scope as to justify deliberate and careful consideration by this Honorable Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of California, for a review by this Honorable Court of the proceedings in said Supreme Court of the State of California in the case numbered therein L. A. No. 18,573 and entitled, "R. Bernard Dickey, plaintiff and respondent vs. Raisin Proration Zone No. 1, et al., defendants and respondents"; and petitioner further prays that upon such review said decision of the Supreme Court of California be set aside

and reversed, and that said Court be instructed to issue its judgment affirming the judgment of the Superior Court of the State of California, in and for the County of Fresno; and that your petitioner have such other and further relief as may be meet and proper.

Dated, San Francisco, California,
February 14, 1945.

WALTER M. GLEASON,
MAX RADIN,
MORGAN J. DOYLE,
*Counsel for Petitioner.*

Office - Supreme Court, U. S.
FILED
FEB 20 1945
CHARLES ELMORE CROPLEY
CLERK

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1944

No. 966

R. BERNARD DICKEY,
*Petitioner,*

vs.

RAISIN PRORATION ZONE No. 1, a proration zone organized under the laws of the State of California, et al.,
*Respondents.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1944

No.

R. BERNARD DICKEY,
*Petitioner,*

vs.

RAISIN PRORATION ZONE No. 1, a proration zone organized under the laws of the State of California, et al.,
*Respondents.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### INTRODUCTION.

The pledge transaction attacked in this case cannot be upheld or justified unless it can be shown that it was a proper exercise of the "police power". Petitioner has briefly set forth in his petition various facts and considerations which show that this transaction cannot be justified under the "police power". Herein we desire to amplify certain of the salient points touched upon in the petition.

However, before discussing this matter of "police power", there is one preliminary matter we will first cover:

## I. THE FEDERAL QUESTION WAS RAISED IN A TIMELY MANNER IN THE STATE COURT.

This is true for several reasons.

The first is that the California Supreme Court actually considered and passed upon this federal question. The certificate of the Chief Justice of that Court, filed herewith, shows that the Court, in denying our petition for a rehearing, passed upon and rejected respondent's contention that this statute as construed by that Court violated the Fourteenth Amendment to the Constitution of the United States, because it took his property without due process of law and denied to him equal protection of the laws. (For copy of this certificate, see Appendix this Brief, p. i.) It is settled that said fact alone justifies the United States Supreme Court in assuming jurisdiction. (*People v. Zimmerman,* 278 U.S. 63, 49 S. Ct. 61, 73 L. Ed. 184; *Lisenba v. People,* 314 U.S. 219, 62 S. Ct. 280, 86 L. ed. 166.)

In the second place, even in the absence of any such certificate from the California Supreme Court, it is submitted that under the circumstances of this case the raising of this federal question for the first time in respondent's petition for a rehearing would have been timely. The Fresno County Superior Court so construed this statute as to eliminate any question of its constitutionality. The same is true of the District Court of Appeal. Both of these lower

Courts treated the issue entirely as one of statutory interpretation and adopted an interpretation which made the statute wholly constitutional. Therefore, when the matter came before the California Supreme Court the case still retained its status of being a case in which petitioner was supporting a construction of this statute, adopted by the lower Courts, which obviated any element of unconstitutionality. Petitioner, who was respondent in the Supreme Court, could address himself only to the arguments of the appellant, and these arguments concerned themselves entirely with the meaning and purpose of the statutory provisions. Under these circumstances, the raising of this federal question by the petition for rehearing was timely.

*Missouri v. Gehner*, 281 U.S. 313, 320, 50 S. Ct. 326, 74 L. Ed. 870;

*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678, 50 S. Ct. 451, 74 L. Ed. 1107;

*Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 367, 53 S. Ct. 145, 77 L. Ed. 360;

*Saunders v. Shaw*, 244 U.S. 317, 320, 37 S. Ct. 638, 61 L. Ed. 1163;

*State of Ohio v. Akron Park Dist.*, 281 U.S. 74, 50 S. Ct. 228, 74 L. Ed. 710.

In the last case cited above, it is said that the raising of the federal question for the first time on rehearing was justified because before that moment the question would have been "speculative". (281 U.S. at 79.)

In the case of *American Smelting Co. v. Baldwin*, 287 U.S. 156, at page 164, it was stated that raising the federal question for the first time on rehearing would be justified by "the unanticipated act of the State Supreme Court in giving the statute a new construction which threatened rights under the Constitution".

In the case of *Grannis v. Ordean*, 234 U.S. 385, at page 392, it was pointed out that the rights of the defendant were not infringed by the trial Court in that case.

> "It was the decision of the Supreme Court upholding the notice (i.e., in the instant case, upholding a new interpretation of the statute) that first ran counter to the federal right."

All these facts are united here. A new construction was placed upon a statute by the State Supreme Court, a construction which it would have been in the highest degree speculative—if not impertinent—to anticipate, and this construction for the first time ran counter to what the petitioner submits is his federal right.

---

## II. THIS LOAN AND PLEDGE TRANSACTION CANNOT BE JUSTIFIED AS AN EXERCISE OF THE POLICE POWER.

### A. The Settled Law.

It is, of course, well settled that:

> "The right of private property is a natural, inherent and inalienable right. Such right antedates all constitutions, but to insure its continuance, it is guaranteed by the federal and by the

various state constitutions." (16 *C.J.S.*, p. 606, § 209.)

"Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Brown in his work on Constitutional law says: 'is that of enjoying private property without undue interference or molestation'." (*Chicago B. & O. Ry. Co. v. City of Chicago,* 166 U.S. 226, 235.)

"As protected by the various constitutions, property is more than a mere thing which a person owns. The constitutional guaranty embraces the right to acquire, possess, use, enjoy, protect, improve, lease and dispose of property. In addition, the guaranty of property includes the liberty to contract * * * and comprehends, as well, the right to engage in any lawful trade, occupation or business." (16 *C.J.S.*, p. 607, § 209.)

Also well established is the rule that it is not only the right, but the duty, of the Courts to be vigilant and ever watchful to zealously guard the constitutional rights of citizens.

Equally well settled, of course, is the basic principle that all property is held subject to a valid exercise by the state of its police powers, and that any reasonable restriction or infringement upon property rights in the exercise of this police power is *damnum absque injuria.* A correlative of this fundamental principle is:

"It is a general rule that in order for a police measure to be reasonable, the means adopted

must be reasonably necessary and appropriate for the accomplishment of the legitimate objects falling within the scope of the power. In order to sustain legislative interference by virtue of the police power, either by a statute or municipal ordinance, it is necessary that the act should have some reasonable relation to such objects, or, for more specific examples, to the public welfare or public health. Moreover, the law must tend toward the accomplishment or promotion of such purposes in a degree that is perceptible and clear either in preventing some offense or manifest evil or in furthering some such object. *The means employed should not go beyond the necessities of the case.*" (11 American Jurisprudence § 303, p. 1075; *House v. Mayes,* 219 U.S. 270, 55 L. Ed. 213, 31 S. Ct. 234.)

"The limit of a state's exercise of the police power is reached when the regulation transcends public necessity." (16 *C.J.S.,* p. 562, § 195.)

The law on this subject is well summarized in *Corpus Juris:*

"A state may not, under the guise of protecting the public, arbitrarily interfere with or prohibit private businesses or lawful occupations, and any regulation must be reasonable in its nature and directed to the prevention of the evils, and adapted to the accomplishment of the avowed purposes." (16 *C.J.S.,* p. 557, § 188.)

This Honorable Court has on numerous occasions applied and enforced the aforementioned fundamental principle of law, viz.:

> "A state may not under the guise of protecting the public, arbitrarily interfere with private business, or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them." *Jay Burns Baking Co. v. Bryan,* 264 U.S. 504, 44 S. Ct. 412, 68 L. Ed. 813; *Lawton v. Steele,* 152 U.S. 133, 137, 38 L. Ed. 385, 388, 14 S. Ct. 499; *Meyer v. Nebraska,* 262 U.S. 390, 399, 67 L. Ed. 1042, 1045, 43 S. Ct. 625.

A study of the numerous cases and precedents existing in this field of jurisprudence will show that in the final analysis, in each case where a state statute which interferes with private property rights is sought to be justified under the police power, these four questions inevitably arise:

> (1) Is the true objective (as distinguished from the avowed objective) of said statutory plan or transaction that of really protecting or promoting some one of the legitimate "police power" objectives (public health, morals, welfare, etc.)?
>
> (2) Is said program or transaction in question necessary to achieve said objective?
>
> (3) Is it free from arbitrary, unnecessary and unreasonable conditions and restrictions?
>
> (4) Does it merely restrict and infringe upon property rights or does it go beyond this and result substantially in a "taking" of such property?

When judged by these settled criteria, the pledge transaction involved in our case is, we respectfully submit, clearly unjustifiable. It fails to satisfy any of said criteria.

Before undertaking to show this, we desire to point out that neither of the two cases which have heretofore considered the constitutionality of the Prorate Act (*Parker v. Brown,* 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315; *Agricultural Prorate Commission v. Superior Court,* 5 Cal. (2d) 550, 55 P. (2d) 495) involved any matter, question or transaction in any way similar to that in issue in our case.

*Parker v. Brown,* supra, originated in a Federal District Court, and involved questions of interstate commerce and antitrust law, and did not even incidentally discuss or involve the question of whether or not this Prorate Act was valid under the Fourteenth Amendment as a proper exercise of police power.

In *Agricultural Prorate Commission v. Superior Court,* supra, the constitutional question, insofar as police power was concerned, was whether or not the state had the right to put into effect this statutory proration plan of withdrawing the "surplus" from the current markets, and thereby regulating and controlling the volume of agricultural crops flowing to markets, in order to prevent a "glut" and demoralization of such markets. The theory of that decision was that the economic loss which the people of the state would suffer, if agriculture should be ruined by a collapse of markets due to uncontrolled overproduction and marketing of crops, was sufficiently serious as to justify such legislation as an exercise of the police power.

There is, of course, a vast difference between the statutory plan before the Court in that case (i.e., the withdrawal and impounding of "surplus" crops) which merely restricts and limits the rate and method of marketing, and the transaction which is in issue in our case, a pledge scheme which in effect confiscates and takes away from the farmer, without compensation, a substantial part of his crop in order that it may be used as security for his neighbor's debts. It should be noted that in the *Agricultural Prorate Commission* case, the Court emphasized that:

> "The terms of the Act apply equally upon all the growers, and distributes the benefits and burdens among them in proportion to the amount of fruit produced by them. The act is therefore neither arbitrary nor discriminatory. It cannot be said that any person thereby is denied the equal protection of the law." (5 Cal. (2d) at 583.)

Such an appraisal certainly does not fit the peculiar and unprecedented pledge transaction involved in our case. This transaction was an arbitrary, discriminatory and confiscatory scheme totally unjustifiable under the police power.

**B. Application of the Aforementioned Settled Principles of Law to the Undisputed Facts in This Case.**

As alleged and shown in our petition, this pledge transaction was not at all necessary to the achievement of the legitimate objectives of the Prorate Act; it formed no part of the stabilization plan authorized by this statute; it had a *private* and not a *public* objective; and it was unfair, unreasonable and un-

necessary. Furthermore, it amounted to a "taking" and "confiscation" of petitioner's property, not a mere restriction, regulation, or minor impairment thereof.

**(a) This pledge transaction was not in any manner an integral or necessary part of the stabilization plan authorized by the Prorate Act.**

What is the stabilization plan as conceived by the California Legislature and set forth in this statute? Section 19.1 of this Prorate Act (R. 105) covers the whole matter. It authorizes the program committee of the Proration Zone to establish and maintain these "surplus" pools "*for the purpose of minimizing the effect of existing surpluses upon market conditions*" and then specifically provides, in explicit language, that when a surplus pool is thus established, the Zone and its program committee have the following duties and powers:

(1) to receive from each producer his "surplus";

(2) to market this "surplus" *for the account of the producer*, when it can be advantageously disposed of without directly competing with the "free" portion of the crop;

(3) to handle all such "surplus" on "a pooled basis";

(4) to account to the growers for the same "on a pooled basis".

After thus specifically outlining the duties of the Zone in its handling of the "surplus" raisins of Mr. Dickey and his fellow growers, the Act proceeds to

define the growers' rights in this pool in very simple language:

> "Each producer delivering his surplus to a pool shall be credited for his proportionate share of the surplus so delivered." (Last sentence in Sec. 19.1.)

Could there, Your Honors, be any clearer language than this?

The intent of the Act, insofar as such a surplus pool is concerned, is crystal clear. To prevent the estimated crop surplus from glutting the market, the proration plan requires this surplus to be impounded with the Zone. For what purpose? For the purpose of keeping this surplus off the market until such time as it can be advantageously marketed *for the account of the growers.*

This is the plan and method, and the only plan and method, provided for by this statute in the impounding and control of this surplus pool. It is this procedure and plan, and the only plan, which received the approbation of the Court in *Agricultural Prorate Commission v. Superior Court,* supra.

Said statutory plan is a far cry, we respectfully submit, from the pledge transaction and plan involved in this case. In our case, Mr. Dickey is not objecting to those requirements of the law which compelled him, along with all other growers, to impound a substantial part of his crop with the Zone. He duly complied with this legal mandate, and then went about his business, secure in the belief and knowledge that, in accordance with the law, his said property thus

delivered in trust would be preserved and conserved by his trustees, and disposed of, if possible, for his advantage (this could have been done). He does object, however, to this peculiar and unprecedented loan program whereby his property rights are sought to be destroyed and wiped out, without his consent and without compensation, in order that his neighbors might be able to secure personal financial assistance. Such a scheme or transaction was in no sense necessary to carry out the stabilization plan authorized by this statute. And, in this connection, we desire to briefly discuss the reasoning of the majority of the California Supreme Court on this phase of the case, viz.:

**(b) The various factual assumptions made by the California Supreme Court (majority) as a predicate for its decision were and are entirely unsupported, unfair and unsound.**

**1. Assumption That But for This 1938 Raisin Pledge the Raisin Market Would Have Collapsed.**

An analysis of the majority opinion of the California Supreme Court will show that the basic premise and keystone of that decision is the following unsupported factual assumption by the Court:

> "Proration alone would not have stabilized prices and insured the raisin industry a fair monetary return, for without available financial support many of the growers would have been compelled by economic necessity to throw their 'free' crops on the market as soon as possible, thus causing a collapse in prices." (R. 109.)

There is not a shred of evidence in the record to support this factual assumption.

Furthermore, it is contrary to the *facts* as shown by Commodity's own answer filed in this case in the Fresno County Superior Court. Attached to that answer is a copy of the resolution (R. 40) adopted by the program committee of this Raisin Zone in 1938, when it decided that there should be a 20% proration for that season. One of the most important (if not the most vital) duties entrusted by this Prorate Act to the Zone's program committee is that of determining in what years proration is necessary, and *just how much of a given crop can,* in such a year, be allowed to freely flow to market without unduly depressing the market. The discharge of this important fiduciary duty requires an investigation and study of a multitude of facts and factors pertaining to crop and market conditions. That is why this statute specifically requires that such a committee be made up of men *familiar with that very industry.* After this study, the program committee determines what percentage of the crop can thus be freely marketed for the given season, and what percentage must be impounded in the stabilization pool and thus kept off the market.

In the discharge of this important statutory duty, the program committee of the Raisin Proration Zone No. 1, after a careful study of all pertinent facts, formally determined and decided on September 12, 1938 that 80% of the 1938 crop could be allowed to go to market unrestricted in time or volume without jeopardizing the market. Thereupon, it promulgated this proration plan for 1938:

"Whereas, pursuant to the provisions of the Agricultural Prorate Act * * * the Program Committee of said Raisin Prorate Zone No. 1 has made an analysis of current and prospective demands, prospective carry over, new crop supplies and other pertinent factors; and

"Whereas, in the judgment of said Committee, in order to adjust the supply of raisins during the 1938-1939 raisin marketing season to market demands, and to stabilize market conditions in the raisin industry, and to insure reasonable prices to producers, proration of the 1938 crop of raisins produced in the Raisin Zone No. 1 is necessary.

"Now, therefore, it is resolved as follows, to-wit:

"1. The Program Committee of Raisin Proration Zone No. 1 hereby determines that proration of twenty (20%) percent of the raisins of all varieties produced in the year 1938 in Raisin Proration Zone No. 1 is necessary during the 1938-39 raisin marketing season to insure reasonable prices to producers.

"2. That proration of twenty (20%) percent of said crop of raisins is hereby determined, effective this date." (R. 40.)

This is *the* record and the only competent record in this case. It is the solemn judgment and findings of this group of "experts" to whom the statute delegated this important function. Any assumption by the Supreme Court of California to the effect that this plan thus determined upon by these experts would not have

been adequate or sufficient to effect the market stabilization (which the Program Committee found and determined it would accomplish), is, we respectfully submit with all due deference, entirely unjustified and unfair.

And, in connection with the foregoing, it is quite significant to note that nowhere in the resolution of the Zone promulgating the proration program for 1938 was there any mention of this loan scheme, or any statement or finding that such a scheme was necessary to prevent market demoralization. As a matter of fact, this loan scheme was not worked out with Commodity until October, and it was not in any way an integral, or any, part of the proration plan put into effect earlier that season. It was simply a private and individual accommodation extended to the growers in line with Uncle Sam's liberal policies toward farmers.

**This unwarranted assumption of fact by the California Supreme Court in and of itself is a denial of due process.**

What the California Supreme Court did in this case was to simply assume and adopt as true certain claims and allegations made in Commodity's answer in this case. No trial was ever had, nor was any evidence ever produced to sustain these unfounded allegations in said pleading. The Fresno County Superior Court took the position that these allegations were utterly immaterial, and raised no proper or adequate defense to plaintiff's complaint. It accordingly sustained plaintiff's demurrer to such defenses. (R. 73.)

The Supreme Court could point to *no evidence* in the record to support its said assumption. Nor did it seek to show *how many* growers would thus be compelled to "dump" their crop or what percentage of the available "free" tonnage would have thus been jettisoned.

Under these circumstances, it is plain, we respectfully submit, that this action by the Supreme Court in assuming the truth of these allegations without proof or evidence was entirely unjustified, and constituted a denial of due process. Due process will be satisfied by nothing less:

> "That to condemn without a hearing is repugnant to the due process clause of the Fourteenth Amendment needs nothing but statement, and this doctrine applies to every court, and to all kinds of judicial proceedings." (16 *C. J. S.*, p. 1265, § 622.)

As this Honorable Court stated in *Baltimore & Ohio R.R. Co. v. U. S.*, 298 U. S. 349, 80 L. Ed. 1209:

> "The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it." (298 U. S., at p. 368.)

The settled law on this subject is summarized in *American Jurisprudence* as follows:

> "The right under the due process clause to a full hearing includes the right on the part of the party whose rights are sought to be affected to

> introduce evidence and have judicial findings based upon it. A party has the right to the opportunity, when in court, to establish any fact, which according to the usages of common law or provisions of the Constitution, would be a protection to his property or his liberty." (12 *Am. Jur.*, p. 313, § 621.)

It is clear, therefore, that petitioner was, at the very least, entitled to an opportunity to present evidence on this factual issue which the California Supreme Court considered so important. By the same token, that Court's order to the Superior Court that it dismiss this case (R. 120) was and is unjustifiable. The very most it should have done, we respectfully submit, would have been to remand the case for a trial covering these factual issues which it considered so controlling.

Had petitioner been given such an opportunity to present evidence on this point, he would have been able to supply ample evidence to show the unsoundness of this assumption by the Supreme Court that the 1938 raisin market would have been broken or seriously demoralized if the necessitous growers had not been provided with some personal financing. Anyone familiar with the raisin producing and marketing season knows that such assumption is incorrect. By far the largest part of the crop (over 80%) is customarily marketed during a relatively short marketing season, consisting of the late fall and early winter months. The growers sell their raisins to the packers and other similar distributors, practically all of whom buy their

requirements on an annual basis. The withdrawal of the "surplus" (20%) from the market in 1938 and the impounding thereof with the Zone stabilized that season's market in the sense that it took off the market that portion of the crop which, if freely marketed, might seriously depress or demoralize the market. Under such circumstances the early sale by necessitous growers of their "free" raisins could not have depressed or demoralized the market.

Furthermore, it could be shown that in such a stabilized season ample financing through banks and other private institutions would have been available for such growers as might be in so difficult a financial position as to be unable to carry their crops for the very short period of time encompassed by the average raisin marketing season. In short, petitioner could readily have proved, by competent evidence, that even if some kind of a loan program had been necessary in 1938 to aid the necessitous growers, *it was not at all necessary, in order to protect the raisin market from demoralization, to resort to this particular pledge transaction.*

And, in connection with this matter of providing financial assistance to needy growers, it seems to petitioner that not only has the California Supreme Court made an unwarranted factual assumption to support the basic premise of its reasoning, but, further and beyond all this, that basic premise of the Court is founded upon an entire misconception of the true purpose and philosophy of the Prorate Act. That statute was not intended as a banking program or Morris Plan

for farmers. It was not intended as a means of enabling growers, after their crop surpluses have been taken off the market, to secure, at the expense of their neighbors, temporary personal financing in order that they might the better be able to speculate on the market's fluctuations and thereby make (or possibly lose) a little more on their raisins. The true and the only purpose, we respectfully submit (as well as the only possible constitutional justification) of such proration plans is that of providing *a fair and mandatory plan of enabling such an industry to take and keep off the market, in a year of substantial surplus, that portion of the crop which might demoralize the market.* The majority of the California Supreme Court have, we respectfully submit, with all due deference, entirely misconceived this controlling and limiting philosophy underlying this proration legislation.

**2. Assumption by California Supreme Court That This "Surplus" Was "Contributed" by the Growers to the Zone, for Use in Obtaining the Maximum Economic Return on the "Free" Portion of the Crop.**

Another important and unfounded assumption made by the majority of the California Supreme Court in this case is that this "surplus" portion of the crop is:

> "subject to the control and disposition of the program committee in attempting to obtain a *maximum economic return* for the prescribed 'free' portion of the regulated commodity * * *" (Italics ours.) (R. 106.)

Wherein does the statute say or imply any such thing? We respectfully submit that it does not. To

the contrary, it plainly appears from this statute that its sole purpose was and is that of keeping the "surplus" temporarily off the market, so as to avoid "breaking" the market and yielding the growers "red ink". Nothing is said therein about achieving or bringing about "maximum" prices, either by rigging the market, manipulating the stabilization pool, or otherwise. The Legislature certainly could not, we respectfully submit, either ethically or legally, authorize a scheme to indulge in any tactics designed to milk "maximum economic return" from the buying public. It is, we respectfully submit with all due deference, surprising to find the high Court of California attempting to read into this statute, and to sanction, a scheme and plan of so controlling the flow of agricultural products to market as to "gouge" from the purchasing public "maximum prices".

If our fundamental jurisprudence is now to be so altered that such "price rigging" schemes can be lawfully carried on, we believe that this Honorable Court should so itself state, so that the butcher, the baker and all other merchants can take advantage of such schemes to force "maximum economic returns" out of "the public" (i.e., this same group for whose welfare this legislation was supposedly adopted under the police power).

Of course, the Prorate Act says nothing about any such maximum price schemes, and an earlier California Supreme Court made a much more accurate and fairer appraisal of the true scope of the Prorate Act when it stated:

"The theory of the Prorate Act may be briefly stated as follows: There is an overproduction in many agricultural products of the state. That unless the marketing of the commodity in case of its overproduction is controlled and regulated by the state so that the amount of such product to be produced, harvested, and marketed *is limited to the amount reasonably necessary to supply the requirements or demands of the market for such commodity,* the price of the commodity becomes depressed and drops so low that the market returns do not equal the cost of production." (*Agricultural Prorate Commission v. Superior Court,* 55 P. (2d) 495, at 507, 5 Cal. (2d) 550.)

3. **Assumption by the California Supreme Court That the "Surplus" Portion of the Crop Is "Waste".**

Commodity constantly sought, in its presentation of this case to the California Courts, to make it appear that under this Prorate Act the grower, in delivering his "surplus" portion of the crop to the Zone, in effect makes a "donation" or "contribution" of it to the public cause. This position is well epitomized by the following statement in Commodity's brief filed in the California Supreme Court:

"The surplus is contributed with practically no strings attached". (Appellant's Opening Brief, p. 26.)

The California Supreme Court likewise adopted this view, but even went further and assumed that this portion of the crop was "waste".

"The surplus represents—in the language of the statute 'agricultural waste'—and is subject to the

control and disposition of the program committee * * *" (R. 106.)

"In short, the proportion of the crop which each producer must deliver to the stabilization pool *represents a contribution* to the economic stability of the zone—a contribution predicated upon *its relative economic worthlessness* and in consideration of a fair return on the 'free' marketable balance." (Italics ours.) (R. 106.)

These assumptions are, we respectfully submit, incorrect and unfounded. Nowhere therein does the Prorate Act state or indicate that the so-called "surplus" is "waste" or worthless. To the contrary, the plain purpose of this statute is that of preventing just such "agricultural waste". The California Legislature, in enacting this novel and stringent program of interfering with the age-old right of the farmer to control his own crops and sell and dispose of them as he sees fit, well knew that the prorated portion of the crop, to be impounded with the Zone, might very well be quite valuable. It knew also that in certain types of nonperishable crops (such as raisins, nuts, etc.), substantial portions of such "surplus" might be carried over from year to year, and, by skillful merchandising by the Zone officials, yield real profits. It also knew that due to market and crop changes in the same year, what might be "surplus" at one stage could very well become needed and valuable "merchandise" at a later stage of the season.

For all of these reasons and others, the Legislature set up a specific statutory trust arrangement where-

under such a Zone is obligated to receive and hold these valuable assets in trust for the contributing growers. This phase was aptly summed up by the California District Court of Appeal in its opinion in this case:

> "This language clearly imports an agency on the part of the Zone and its Proration Program Committee to receive and dispose of the raisins in the stabilization pool for the benefit of the growers who are the owners of at least an equitable interest in them. It also creates the obligation to account to the growers for the net receipts, if any, derived from the disposition of the surplus raisins * * *"
>
> "Defendants argue that the relation created is not a trust * * * This argument lacks convincing force and is not borne out by the clear language of the statute. Whether the relationship created be called that of a trust or by some other name, it possesses the characteristics of a true trust. The corpus is created and is composed of the surplus raisins in the stabilization pool. This corpus is placed in the possession of the Proration Program Committee with the power of sale or other disposition under the limitations imposed. The Proration Program Committee is required to account for the same on a pooled basis to the beneficiaries who are the growers having surplus raisins in the stabilization pool." (140 P. (2d) 53, at 63.)

It must be remembered, in connection with all of this, that we are dealing in this case with a nonperishable crop, one that is admirably adapted to being warehoused and held for long periods of time (years) to

await changes in the market conditions. As a matter of fact (if this issue is material and relevant), petitioner stands ready to prove that portions of this very 1938 crop were warehoused and held for a couple of years and then brought a price over twice the price prevailing in 1938.

In short, the "surplus" portion of these prorated crops is not intended by this statute to be considered as, "agricultural waste". Such "surplus" is a very important part of the farmer's crop, to be exploited with the object of yielding him as much additional revenue as possible.

And, in this connection, it should also be noted that under this prorate statute the percentage to be impounded could conceivably be fixed at 50% or even 80% instead of 20%. In other words, we must not at any time lose sight of the fact that we are dealing herein with a novel and drastic statute which empowers a Zone to put into effect and enforce, by legal mandate, a program which requires a farmer, after he has by hard work, money and worry produced a crop, to yield up control of a substantial part of it, *the exact percentage to be determined by others.* Certainly, with such a statute and situation involved, the scope and effect of this drastic legislation should not, we respectfully submit, be stretched and extended, under the guise of "police power", by resorting to such unfounded and unjustified factual assumptions as were made by the California Supreme Court in this case.

"Statutes * * * which impose special restrictions or burdens or confer special privileges upon certain individuals or groups of individuals separate and apart from the rest of the community * * * are to be strictly construed; and as a result, they must not be extended beyond their literal meaning. They can be applied only to cases clearly falling within the statutory provisions.

"Statutes pertaining to the exercise of a trade or profession, to eminent domain, to the restraint of personal liberty, or freedom of contract, and the like, are statutes in derogation of common right and subject to strict construction." (*Crawford, Statutory Construction*, 1940, p. 481, § 246.)

In connection with the aforementioned remarks as to the importance of the duty imposed upon these Zone officials of controlling and handling the disposal of this "surplus" portion of the crop for the benefit of the growers, we desire to amplify one other point briefly touched upon in our petition herein, viz.:

**This pledge transaction was fundamentally inconsistent with the basic spirit and purpose of the Prorate Act because it involved an attempted delegation of trust duties of the Zone officials to strangers.**

Under this Prorate Act, the grower is compelled *by law* to entrust the fate of a part of his crop to the Zone as his trustee. As shown above, the Zone, acting by and through its Program Committee, is under a strict fiduciary and mandatory duty to try to market these surplus crops to the best advantage of the growers, when and if this can be done without unduly depressing the market.

Who is this Program Committee which is thus charged and entrusted with these important fiduciary duties? A reference to the prorate law will show that one of the salient features of this legislation is that *this committee shall consist almost entirely of growers* (five out of seven members). (Section 18.)

The reason for this is plain. It obviously was the purpose and intent of the Legislature (in enacting this novel and stringent law under which a farmer is deprived of his power to fully control and dispose of his crop) that *a group of farmers should control and manage the affairs of the surplus pool and all other matters incident to the marketing program.* The wisdom of this requirement is obvious.

The pledge transaction which the California Supreme Court attempts to justify in this case as a proper exercise of police power, violates this express objective of the statute because it represents an unlawful delegation and abdication by the Program Committee of these important fiduciary duties. A glance at the pledge agreement (R. 41) which the Program Committee undertook to enter into with Commodity reveals this attempted delegation and abdication. That agreement provides, among other things, that:

> "Commodity may sell all or any part of the pledged raisins at any time, without demand or notice, at one or more pledge sales (which may be public or private, as determined by Commodity) *on such terms and for such prices as Commodity may deem fair* * * *." (Italics ours.) (R. 43.)

In other words, the Program Committee, under this arrangement, gives Commodity unlimited and unfettered power to dispose of these valuable assets belonging to Mr. Dickey and his fellow growers.

We believe it requires no extended argument to demonstrate the absolute impropriety of this attempted delegation of authority. This power to decide when, how and for what price the raisins in the stabilization pool shall be sold is, as shown above, one of the most important aspects of these fiduciary duties imposed upon the Program Committee by this statute. This fiduciary duty is particularly important in our case because we are dealing with a crop (raisins) which is not perishable, one that is admirably adapted to the exercise of skill and shrewd judgment in the determination of the various factors which govern the marketing thereof; a crop which can be warehoused and held for an extended period to await changes in the market conditions. The discretion involved in deciding how long and under what conditions to hold the crop, or portions of it, and when and how to market it is a fiduciary power and duty of paramount importance to the grower, one which directly translates itself into red or black ink, depending upon the ability, skill and *fidelity* which govern the exercise of such discretion.

To permit a transfer or delegation of this function to third parties (as this pledge purports to do), not only flies squarely in the teeth of the plain language of this prorate statute, but likewise contravenes fundamental rules of the law of agency.

It is, of course, an elementary rule of the law of agency that an agent entrusted with fiduciary duties cannot delegate them without the consent of his principal, viz.:

> "The general rule is that an agent in whom is reposed trust or confidence, or who is required to exercise discretion or judgment, may not intrust the performance of his duties to another without the consent of his principal, and since nearly all acts of agency involve discretion, and the very selection as agent ordinarily implies personal confidence in the agent chosen, it follows that one clothed with authority to act for a principal must ordinarily perform the act himself, and cannot without the principal's consent delegate it to another; or, as is frequently stated, an agent cannot delegate powers calling for the exercise of discretion, skill, or judgment, or to do acts that are not merely clerical, mechanical, or ministerial in their nature." (2 *Corpus Juris,* p. 685, § 342.)

This rule is particularly applicable to public or quasi-public officials. (46 *Corpus Juris,* p. 1033, § 291; 21 *Cal. Jur.,* p. 881, § 63; *Knight v. Eureka,* 123 Cal. 192; *Scollay v. County of Butte,* 67 Cal. 249.)

*California Jurisprudence* sums up this settled rule of law as follows:

> "§ 63. Delegation of Powers.—As a general rule, boards and public officers, in the exercise of powers conferred upon them, may appoint agents to discharge ministerial duties not calling for the exercise of reason or discretion. But they cannot go beyond this and delegate to others duties, the discharge of which, calling for the exercise of

reason and discretion, are regarded as public trusts." (21 *Cal. Jur.*, p. 881, § 63.)

It is clear, we respectfully submit, that the attempt of the Program Committee to thus abdicate these important fiduciary duties in favor of Commodity Credit Corporation is invalid and directly contravenes the prorate statute. It follows, therefore, that such a transaction certainly cannot be justified under any theory of "police power".

And, in connection with this phase, we desire to point out two things. The first is that it is no answer to argue that the Commodity Credit Corporation is a public agency, an arm of the United States Government. That fact does not justify this delegation. The California Legislature intended and stated that the California farmer was, *at the very least,* to have the protection and assurance that the fate of his assets, and the business of this Zone, would be controlled and determined *by his own fellow growers.* This obviously does not mean that these important matters are to be decided by a group of federal employees back in Washington, no more than it means that such functions could be discharged by the Department of Agriculture of Idaho.

Furthermore, there are very cogent reasons why this particular attempt to delegate this important function to the Commodity Credit Corporation (or any other similar federal agency) was a most dangerous step for the San Joaquin Valley raisin producers, one fraught with various perils. As the record

(and appellants' own brief) plainly shows, it has been the practice of the Commodity Credit Corporation to dispose of the raisins pledged to it, in large lots *to other branches of the federal government.* For example, a substantial part of the 1938 raisin crop thus pledged to the Commodity Credit Corporation *was sold by it to the Federal Surplus Commodities Corporation.* The same thing happened in 1940. (Commodity's Brief, p. 28, footnote.)

In short, government officials in Washington, in charge of the affairs of the Commodity Credit Corporation sit down (no doubt amidst other pressing business) and decide to sell these pledged raisins to another branch of the government. *They* fix the price. Neither Mr. Dickey nor his fellow growers, nor even their chosen representatives (the Program Committee), have a word to say as to this, an important aspect of their business. Then, the Commodity Credit Corporation, having thus disposed of these raisins, turns around and in effect tries to hold the assets of Mr. Dickey and his fellow growers for the "deficiency" resulting from this transaction, or series of transactions.

We are confident that it requires no extended argument to convince this Honorable Court that such a plan certainly is not in consonance with either the letter or basic spirit and purpose of the Prorate Act. Likewise, we believe it requires no extended argument to convince this Honorable Court that the farmer's best interest is served only by placing and leaving the control of his assets and crops in the

hands of himself and his fellow growers, acting through their Program Committee. The California Legislature so concluded, and it made it plain in this statute that this was to be the plan and program.

Incidentally, Commodity claims it sustained a large loss on this 1938 program because it loaned too much to the borrowing growers, an alleged fact upon which the majority opinion of the California Supreme Court lays stress. (R. 101.) This alleged "loss" arose in just such manner as we have just indicated, and by just such "wash" sales. Had not Commodity usurped, by this unauthorized pledge transaction, the fiduciary duties and functions reposed by the California Legislature in the Zone officials, the California raisin growers would have been much better off, and Commodity would not now be trying to penalize Mr. Dickey and some four thousand other growers for its mistakes.[1]

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[1]Incidentally, an examination of the various papers executed in connection with this pledge will indicate, we believe, that no one knew better than the officials of Commodity Credit Corporation that this purported pledge of the stabilization pool raisins was a very questionable transaction, so much so that it took particular pains to see *that each grower who borrowed on his crops was required to specifically hypothecate his stabilization pool raisins.* To procure such a loan, he was required to sign a so-called "Growers Marketing Agreement" (RPA-1) wherein, in addition to hypothecating his "free" tonnage, he also did the following:

> "The grower hereby authorizes the Association and/or the Program Committee for Raisin Proration Zone No. 1 to pledge or hypothecate any or all raisins delivered by him to the prorate stabilization pool, as security for any loans or advances made thereon by Commodity Credit Corporation or other institution for the handling and storage of such stabilization tonnage and also as an additional collateral for any loans or advances that may be made by Com-

**CONCLUSION.**

The constitutional questions involved in this case are important ones. The invasion and impairment of innocuous property rights herein are so drastic and severe as to be tantamount to confiscation. The sanctioning by the California Supreme Court of such confiscation under the theory of "police power" is, we respectfully submit, so dangerous a precedent as to deserve the careful consideration of the Honorable United States Supreme Court. Petitioner therefore respectfully requests an opportunity to fully present these constitutional questions to this Honorable Court, and prays for its intervention herein by certiorari.

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modity Credit Corporation or other institution to raisin growers or to the Association."

Also, particular note should be made of the meticulous phrasing the "Pledge Agreement", viz.:

> "The Committee agrees that it *will acquire* from producers all surplus raisins as determined under the terms of said order." (R. 42.)

The lawyers for the government, no doubt well realizing the invalidity of any direct attempt to hypothecate the stabilization pool raisins without the growers' consent, apparently inserted this language so as to obligate the Program Committee *to acquire* these raisins so that it would be in a position to duly hypothecate them. As a matter of fact, an examination of the resolution of Commodity Credit Corporation (R. 44) will show that the matter of the hypothecation of these stabilization pool raisins was given little attention. The *only* reference to it is the provision of paragraph 4 to the effect:

> "That there be delivered to the Custodian the pledge agreement, in form satisfactory to counsel for Commodity, of the Association and the Program Committee for Raisin Proration Zone No. 1 covering the *acquisition and pledge* of all surplus raisins." (R. 46.)

In other words, while the details of the loan on the "free" tonnage are meticulously set forth in, and prescribed by, this resolution, the matter of the stabilization pool raisins is but lightly touched upon.

Your petitioner fully realizes that, in the words of Rule 38 of the Supreme Court (Section 5): "A review on writ of certiorari is not a matter of right but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". But it is submitted that these special and important reasons are clearly present here. Furthermore, this case comes well within the specification of subsection (a) of Section 5 of Rule 38, in that it presents a situation "where the state court has decided a federal question of substance * * * in a way probably not in accord with applicable decisions of this court" (i.e., the Supreme Court of the United States). Your petitioner has heretofore indicated that the holding by the Supreme Court of California, in the instant case, to the effect that the property of petitioner may be taken without his consent to secure the debt of a wholly different person seems to contradict a whole line of decisions of this Honorable Court which declare similar takings to be in violation of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner seeks, at this stage, merely an opportunity to present fully to this Honorable Court the reasons that urge him to ask a reversal of the decision of the Supreme Court of California. It will be petitioner's first opportunity to be heard in defense of his constitutional rights.

This Court has, as the record shows, been ever ready and vigilant to protect the rights and properties of citizens against improper "police power" ef-

forts. It has stricken down many legislative plans and programs, even in the face of express and positive legislative declarations that such programs were necessary to promote the public welfare. It is submitted that this Honorable Court should be even more ready to intervene in a case, such as ours, where the unlawful deprivation of property is predicated, not on any plan or program expressly authorized by the statute or declared by it to be necessary for the public welfare, but upon an "implied police power", read into the statute by a process aptly characterized by Justice Marks of the California District Court of Appeal as:

> "Judicial legislation of the worst kind." (140 P. (2d) 65.)

Dated, San Francisco, California,
February 14, 1945.

Respectfully submitted,
WALTER M. GLEASON,
MAX RADIN,
MORGAN J. DOYLE,
*Counsel for Petitioner.*

**(Appendix Follows.)**

Appendix

# In the Supreme Court

OF THE

## State of California

L. A. No. 18,573

R. Bernard Dickey,
Plaintiff and Respondent,
vs.
Raisin Proration Zone No. 1, a prorate zone, etc., et al.,
Defendants and Appellants.

CERTIFICATE.

This is to certify that in the above mentioned cause, the plaintiff and respondent in the petition for rehearing contended that the statute, as interpreted by this Court, violated the Fourteenth Amendment to the Constitution of the United States, and that the Court, in denying the petition for rehearing, passed upon and rejected that contention.

Dated, February 13, 1945.

(Seal of California Supreme Court)

Phil S. Gibson,
Chief Justice of the Supreme Court of the State of California.

L. A. No. 18,573

# In the Supreme Court

OF THE

## State of California

R. BERNARD DICKEY,
*Plaintiff and Respondent,*

vs.

RAISIN PRORATION ZONE No. 1, a proration zone organized under the laws of the State of California; RAISIN PRORATION ASSOCIATION (a corporation), ARTHUR C. BLAYNEY, BEN DRENTH, MELCHOIR HANSEN, BEN H. HAYES, W. K. LEE, CLARENCE WILSON, D. RAY HOAK, WILLIAM N. KEELER, E. C. SMITH, as members of the Program Committee of said Raisin Proration Zone No. 1 and as members of the Board of directors of said Raisin Proration Association, R. L. MILLER, E. H. CORNELL, A. E. GLASS, COMMODITY CREDIT CORPORATION (a corporation),
*Defendants and Appellants.*

## RESPONDENT'S PETITION FOR A REHEARING.

*To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:*

The respondent petitions for a rehearing of this cause.

We do not complain of the ruling in reversal of the judgment. After study, we concede the probable soundness of the holding of the District Court of Appeal—that affirmative defenses appear which require consideration by the trial court, both as to law and fact. However, the direction by this Court to the trial court to enter a judgment dismissing the complaint is too drastic. This direction has been rested, by a four to three vote of this Court, upon the validity of the pledge transaction here involved. The latter ruling has in turn been grounded upon a supposed state of facts and conceptions of the condition of the market in raisins which the record wholly fails to warrant or sustain. The untimely manner by which this Court has undertaken to prejudge the facts will be disclosed hereinafter.

Your petitioner urges the following principal reasons for a rehearing:

I.

The majority opinion is predicated upon unsupportable and premature assumptions as to the state of the market for raisins. The majority opinion advances, in its assumption of facts, to the stage of unwarranted hypothesis. The conjecture is indulged in, that had it not been for this pledge transaction (depriving non-borrowers of their whole interests in the surplus pool) the entire market for raisins would have been demoralized. That this is a factual issue, wholly unsupported by the record, will presently be shown.

II.

When the Statute is given the meaning here adopted by the Court, a most serious question of constitutionality arises under the Constitution of the United States of America. This question of constitutionality has not been considered by the Court. It has not arisen because to date it has been primarily a question of the meaning of the Statute. The point of constitutionality has, therefore, come up but incidentally. This particular issue of constitutionality was not involved in the two cases cited by the majority opinion.

III.

In reaching the interpretation adopted in the majority opinion, no heed has been paid to precise provisions in the Statute which negative such meaning.

IV.

The theory of implied power, upon which this decision mainly rests, affords no support for the decision.

V.

The provision of the Statute as to donations to charity does not justify a holding that certain growers by this pledge device are to lose all interest in the surplus pool and that the remaining growers possess a preference.

VI.

The holding of the majority departs from well-settled principles of statutory construction.

VII.

The majority opinion is in conflict with the express provision of the Statute with respect to the costs of operation.

These grounds for a rehearing will be dealt with in the above order. For the moment, we turn to a phase of the case of which the Court may not be mindful.

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The plaintiff is maintaining this suit, not as an individual, but as a member and representative of a class. This class, as the majority opinion recognizes, consists of the producers of 47.26 per cent of the raisins in the zone, harvested for market during the period here involved. These persons did not borrow upon their raisins and, for that reason alone, have, according to the majority opinion of this Court, lost all right to financial return upon their respective interests in the raisins in the surplus pool.

From the presence of but one plaintiff, the Court is, of course, not to infer that others similarly treated are not so complaining of, and do not feel aggrieved by, the confiscation of their property accomplished in the so-called marketing plan. In simplicity of procedure, the law permits one plaintiff, as a representa-

tive. The wrong here inflicted must be considered as extending throughout the 47.26 per cent ownership.

According to the biblical tenet, "the sins of the fathers are to be visited upon the children". Extending further than that is the majority decision in the case at bar. It visits upon nearly a fifty per cent ownership by an agricultural group the consequences of the financial ills of the remainder.

In order to demonstrate the error of the majority opinion, it is not necessary to show other than that this plan of pledge was illegal and unauthorized. We are not concerned with a general question as to the power to arrange for a pledge of a grower's individual interest in the surplus pool. The property was fungible. For aught that appears, such individual pledges of interest could have been arranged for, without the confiscation of the property rights of non-borrowers.

In substance, this Court has held that a race to borrow was the order of the day. Those who felt themselves not in such necessitous condition as to require a loan from Commodity Credit Corporation must, according to the decision of the majority, suffer a deprivation of interest in the surplus pool in order to replenish the loss for advancements to other growers.

This decision has been reached notwithstanding the entire absence of any language in the Statute permitting this kind of a pledge. Everyone, including the litigants and the members of this Court concedes that no such authority is to be found in any words

contained in the Statute. The conclusion reached by the majority rests mainly upon a consideration of the first section of the Statute (the preamble), plus a supposed implication of power which the author of the majority opinion draws from that declared purpose. The process by which this conclusion is reached represents an innovation in the field of statutory interpretation. A novel and most dangerous precedent is created by which extended conceptions of the general welfare operate to deprive a person of property without just, or any, compensation, and, without due, or any, process of law.

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**THE STATUTE.**

The appropriate provisions of the

*Agricultural Prorate Act of 1933; Stats. 1933, p. 1969 (as amended); Deering's Gen. Laws, 1937, Act 143a,*

are fully outlined in both opinions. Summarization only is necessary here, and merely for the purpose of convenient reference.

Subdivision (1) of the Statute declares a "public interest" to prevent "chaotic economic conditions" resulting from a production of agricultural commodities in excess of current demand. The declaration of public interest extends no further.

The Act, in addition, provides for the creation of an Agricultural Prorate Commission with authority to establish proration zones and pass upon petitions

for marketing programs. (Secs. 3 and 8.) In the event of the establishment of a marketing program in a Proration Zone, such program is to be formulated by a local Program Committee. (Secs. 15 and 18.) The marketing program becomes compulsory when adopted by the Agricultural Prorate Commission. (Secs. 18, 24, 25.)

The majority opinion adds (p. 9):

> "Speaking generally, the program committee should determine the total of the regulated commodity to be produced in a crop year, the percentage of that total which can be marketed profitably in the usual and ordinary channels of trade, and the percentage which cannot be so marketed without flooding the market and breaking the market price. The percentage of the commodity which can be absorbed by the market is left under the free control of the producers, who may market and dispose of that proportion of their crops as they may please without any restrictions. The balance of the commodity which cannot be absorbed in the usual channels of trade is designated as surplus, which must be delivered to the program committee of the zone and put into a stabilization pool, where it is held, cared for and disposed of by the committee in such a manner as not to come in competition with the 'free' portion of the crop."

We add that this is far more than "speaking generally". The above is a precise enumeration of the factors to be considered by the program committee. (Sec. 19.1.)

## THE GROUNDS ASSIGNED BY THE MAJORITY OPINION AS A BASIS FOR THE DECISION.

As we read the prevailing opinion, it rests upon two grounds: (1) the hypothecation by those in need of money plus the pledge of the whole surplus pool prevented a break in the market for raisins and hence was for the advantage of those who did not borrow and therefore was for the "general welfare", and (2) the provision for a possible donation to charity demonstrates that no one had a vested interest in the surplus pool. The remainder of this petition devotes attention to both grounds.

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## ARGUMENT.

### I.

### THE MAJORITY OPINION RESTS UPON ISSUES OF FACT WHICH NOT YET ARE ESTABLISHED BY THE RECORD AND WHICH SHOULD BE DETERMINED BY THE TRIAL COURT.

At the inception of this petition, we call attention to the premature adjudication upon the facts which the decision of the majority accomplishes. Unwittingly this Court has assumed a capacity to predict as to market conditions which exceeds the ability of any skilled market speculator. This Court has announced that if a scheme of advancement to those ready of foot to procure loans had not been adopted the entire raisin market would have been demoralized. Upon that postulate, the Court has concluded that the pledge plan was for the benefit of all raisin growers in main-

taining prices, even though certain of them did not see fit to borrow.

Upon what basis has the Court reached this conclusion? We find nothing in the record to support it.

There can be no doubt that the Court may take judicial knowledge of the distressed condition of the raisin growers in past years. It by no means follows that the Court is to uphold a plan by which interests in the pool—declared by Statute—are to be destroyed. We are prepared to show that the withholding of a certain percentage of the crop is sufficient to create a stable and fair market. **Such withholding plan is all the Statute provides for or contemplates.**

This Court is in no position to say what would have happened to the raisin market, had the arrangement for marketing progressed no further than the language of the Statute, in the withholding of the declared surplus. This Court, likewise, is in no position to say that if the pledge had been restricted to the respective interests in the surplus pool of those incurring loans, the sought-for result of the stabilization of the market would not have been accomplished.

In short, this Court has held that the constitutional basis for this pledge arrangement lies in a certain state of facts as to the raisin market. The plaintiff desires to tender issue as to those facts. The plaintiff is prepared to prove that the very factor of withdrawal from the market the surplus supply itself stabilizes and creates a fair price.

It follows that the plaintiff instead of suffering the dismissal of his complaint, should have the opportunity to meet the assertions as to the facts.

The author of the majority opinion recites that benefits inured to all growers as shown by "the record". (Opinion, bottom of p. 18.) The record here consists of the pleadings. The Court has apparently accepted as true various allegations and conclusions incorporated in the answer of defendant Commodity Credit Corporation. It works manifest injustice to the plaintiff and those he represents for the Court to accept as true the allegations and conclusions of the answer of a defendant on issuable facts. Here, the Court has gone even beyond that and has not only accepted them as being true but by its decision has precluded and barred plaintiff from proving their falsity, and has reached an interpretation based upon those issues of fact.

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## II.

**THE STATUTE, AS INTERPRETED AND APPLIED BY THE COURT, IS UNCONSTITUTIONAL AND VOID BY REASON OF THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.**

Heretofore in this litigation, the question has been restricted to the meaning of the Statute. Inasmuch as the Court has held that a grower may be deprived of his interest in the surplus pool—notwithstanding the precise provision of the Statute that the program committee "shall handle all commodities received by

a surplus pool and account for the same on a pooled basis" Sec. 19 (1) (b)—it must be obvious that the plaintiff and those of his class have been deprived of their property without due, or any, process of law, and in denial of the equal protection of the law.

*Constitution of the United States,* Amendment XIV.

Surely, it cannot be argued that compensation is afforded and due process accomplished upon these nebulous benefits in the upholding of the market price, when the Act, in precise terms, compels the program committee to account to all contributors "on a pooled basis". What has become of the plaintiff's interest and those of his class of fellow-contributors to the pool? Has it been due process to destroy their property by a transaction appropriately described in the majority opinion as a matter of "private determination"?

At the inception of the opinion of the majority, two cases,

*Agricultural Prorate Commission of California v. Superior Court,* 5 Cal. (2d) 550,

and

*Parker v. Brown,* 317 U. S. 341, 87 L. Ed. 315,

are cited. Each case involves the validity of the provisions of the Act which provide for the creation of a surplus pool. Neither case involves a pledge of the whole or any part of the surplus pool, and therefore are of no significance here.

It is important to note the precise ground upon which the authority to establish a surplus pool was held constitutional in

*Agricultural Prorate Commission v. Superior Court* (Supra), 5 Cal. (2d) 550.

There, the Court said (top of p. 573):

> "No claim is made, however, that the act, as it is enforced through the program instituted by the committee will not act equally and impartially upon all producers of lemons grown in the state and that if there is any benefit to be derived from the observance of the program by the growers such benefit will be enjoyed ratably by all. Nor is it questioned that if any detriment is sustained by a compliance with the terms of the act, such burden or detriment will rest equally upon all lemon growers in proportion to the amount of lemons which each grower produces."

How extreme in contrast is that language to the result eventuating in the case at bar! Here, all producers are not treated alike. Persons less acquisitive than those who recognized Santa Claus find that their interests in the surplus pool have vanished in a contribution to the "general welfare".

Within the limited time afforded for the preparation of this petition, it is impossible to present at any length a discussion of constitutionality if the meaning now found by the court is to stand. We urge that a rehearing be granted to permit a thorough presentation of this point.

## II.

### THE MEANING OF THE STATUTE, DETERMINED UPON IN THE MAJORITY OPINION, IS AN ABSOLUTE CONTRADICTION OF THE PLAIN WORDS OF THE LAW.

We place emphasis upon the reference by Mr. Justice Schauer, in his dissenting opinion, to that portion of the Statute which provides that

> "Each producer delivering his surplus to a pool shall be credited for his proportionate share of the surplus so delivered * * *"

and to that further portion of the Statute which provides that

> "The program committee shall handle all commodities received by a surplus pool and account for the same on a pooled basis." (Emphasis added.)

It cannot be denied that the majority opinion directly holds that the pool need not be accounted for to contributing producers. We fail to find any discussion in the majority opinion of these portions of the Statute. The interpretation at which the members in majority have arrived cannot be reconciled with the foregoing precise language of the Statute.

The Court has not only read into the Statute something that is not there, but has gone further; it has declared an implied power which is directly opposed to the precise and unmistakable wording of the Statute. The course here taken is in conflict with the elementary rule so frequently reiterated in the authorities.

*San Francisco v. Mooney,* 106 Cal. 586, 588:

"This is a legislative act, and is to be interpreted according to the intention of the legislature upon its face. Every technical rule as to the construction or force of the particular terms must yield to the clear expression of the paramount will of the legislature."

In accord:

23 *Cal. Jur.,* Secs. 108 and 109, pp. 727 and 730 (and authorities therein cited).

The interpretation here adopted by the majority of the Court does violence to the expressed intent and object of the Statute in still further respects. If general authority to pledge all of the surplus is to be read into the law, what assurance is there that, as a result of future transactions, the commodity designed to be withheld in appropriate portion and for a necessary length of time will not be dumped upon the market in foreclosure of the pledge with ruinous results to growers. The instant decision gives carte blanche in the creation of a pledge of the whole surplus pool without restriction as to terms and without limitation in dealing only with governmental agencies. Such restrictions cannot be conceived, because the Statute contains no provisions whatever upon the subject of pledge.

These considerations light the danger signal. They point to the consequences of the judicial legislation here indulged in by the majority opinion.

As Mr. Justice Schauer points out (bottom of p. 4), the effect of this decision permits the surplus crop to enter the market in direct competition with the "free" crop—the very thing which the law seeks to void.

## IV.

### THE IMPLICATION OF POWER TO CREATE THIS EXTENT OF PLEDGE IS UNJUSTIFIED.

The principal line of reasoning adopted by the majority decision is expressed at the bottom of page 20 of the official opinion. It is there ruled that "* * * government officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers." (Emphasis is that of the author of the majority opinion).

We have heretofore demonstrated that, in light of the clear and unambiguous wording of the Statute, it cannot logically be held that a power **directly opposed to the express language of the Statute** can "fairly be implied".

We have carefully examined the authorities cited by the author of the majority opinion at the point just indicated. All of these cases deal with implied powers essential to the proper exercise of power expressly granted. For example, the rule was thus confined in *Crawford v. Imperial Irrigation District,* 200 Cal. 318, 334 (quoted from in the opinion), where the doctrine at the foundation of the decision was stated in this restricted and limited manner:

> "A public officer or board has not only the powers expressly enumerated by law, but also those implied powers which are necessary to the exercise of the powers expressly granted." (Emphasis ours.)

We are confident that a further examination of these authorities by those participating in the majority opinion will establish that the cases cited do not sustain the holding of this Court. It certainly cannot be said in the case at bar that the power to create this extended pledge is to be implied as a necessary incident to the express powers conferred by the Statute. The latter are confined to the creation and maintenance of a surplus pool. It cannot be doubted that the legislature had only this in mind to enact as law and intended to go no further.

Heretofore, it has always been the rule that courts will not read into a Statute words that are not there and will not indulge in judicial legislation.

> *Christophel v. Riley,* 206 Cal. 242, 245 (middle):
> "While this court will go to all reasonable lengths in interpreting the powers vested by the legislature in the ministerial officers of the state, in order to give effect to the laws and so serve the ends of justice, it will not by construction confer upon such officers authority which the legislature has seen fit to withhold."

The above doctrine is sustained by numerous other authorities.

> *Allyne v. Murasky,* 200 Cal. 661;
> 23 *Cal. Jur.* 730, Sec. 109;
> Respondent's Brief, pp. 33-39.

## V.

### THE AUTHORIZATION OF A DONATION TO CHARITY DOES NOT JUSTIFY THE HOLDING IN THE CASE AT BAR.

As we have noted, one of the principal grounds for the decision is that no substantial interest is possessed by the plaintiff and those of his class because his rights could have been extinguished, under the language of the Statute, by a donation to charity. (Opinion, top of p. 20). These clauses are, of course, not here directly involved. They would appear of doubtful validity. Until their legality is established, a resort to these provisions is of small force.

In any event, the primary answer is that where a gift to charity occurs, all growers are treated alike. The plaintiff's cause of action here rests upon the taking of his property for the benefit of other growers —and the discrimination against him in favor of other growers. The reference to outright gifts to charity, which might occur in other instances, therefore does not meet the issue.

If the reasoning of this Court be followed to its logical conclusion, it would appear that this Court would have to confirm any donation to charity which undertakes to give away the interests of certain specifically named growers. Would not this Court possess the most extreme doubt of the validity of such transaction? And yet, if the reasoning of this Court be sound, such an arrangement would have to be confirmed. We therefore submit that this portion of the majority opinion affords no sound basis for the decision.

## VI.

### THE HOLDING IS IN CONFLICT WITH WELL SETTLED RULES OF STATUTORY CONSTRUCTION.

The Statute purports to enumerate the powers of the Program Committee. It is well-settled that under such circumstances these powers are exclusive. As noted by Mr. Justice Schauer, where (as here) a statute is creative a specification of powers demonstrates an intent not to establish any others. Authorities so holding are set forth at the middle of page 3 of the dissenting opinion. We ask the most careful consideration of these cases as they include several decisions not mentioned in our brief and possibly not yet examined by those participating in the majority opinion. This Statute is creative in the sense that it gives birth to an entirely new rule of law with reference to agricultural products and is in derogation of the common law.

In such an important claimed power as the ability to hypothecate in such manner as to deprive a non-borrower of his whole interest in the surplus pool, is it conceivable that the legislature intended to confer it by implication? And if that question, as we believe it must, is to be answered in the negative, it inevitably follows that the majority opinion does nothing else than extend the law by the process of judicial legislation.

There is no need to repeat the material incorporated in our brief. We desire, however, again to refer to the various canons of instruction there set forth. (pp.

33-60). We submit that the instant ruling is violative of every one of them.

In this respect, an outstanding error of the majority opinion is in turning to the preamble from which to add a power not expressly enumerated. The true rule is that this is not a correct method of determining the meaning of a statute. If this were the proper manner of approach, statutes, through generality of language in the introductory portion, could be boundlessly extended and would be uncertain in meaning to an unlimited extent. The enacting clauses control and are not to be extended by the preamble or the declaration of purposes or objects. Authorities to this effect are cited at page 53 of our brief.

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## VII.

**THE MAJORITY OPINION DEPARTS FROM THE EXPRESS PROVISIONS OF THE STATUTE WITH RESPECT TO THE COSTS OF OPERATION.**

In still a further respect, the majority opinion does violence to the exact words of the Statute. That opinion expressly rules that the expenses incurred in the handling and storage of the pooled raisins necessarily comprehended losses on the pledges here made on nonrecourse notes as a cost of operation.

As Mr. Justice Schauer points out at the inception of the dissenting opinion, the Statute contains express provisions as to the meeting of costs of operation. These are to be met by fees from the issuance of certificates. (Secs. 19.1, 20 and 21).

Inasmuch as there is no attempt in the majority opinion to dispose of the sections of the Statute just cited, we rest upon the discussion of this subject in the dissenting opinion.

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This case involves issues of vast importance, some of which (concerning constitutionality) have not yet been fully presented to the Court. It has been decided by the narrow margin of one vote. Even if this petition has not changed the attitude of a single member joining in the decision, it can doubtless be said by any one of those members of the Court that the questions are so highly doubtful of solution as to call for further consideration by this Court. As a final reason for a rehearing, the Court will realize that it has mistakenly assumed the existence of a state of facts not shown by the record and which the plaintiff should be permitted to dispute and disprove.

We urge that a rehearing be granted.

Dated, San Francisco,
September 15, 1944.

Respectfully submitted,
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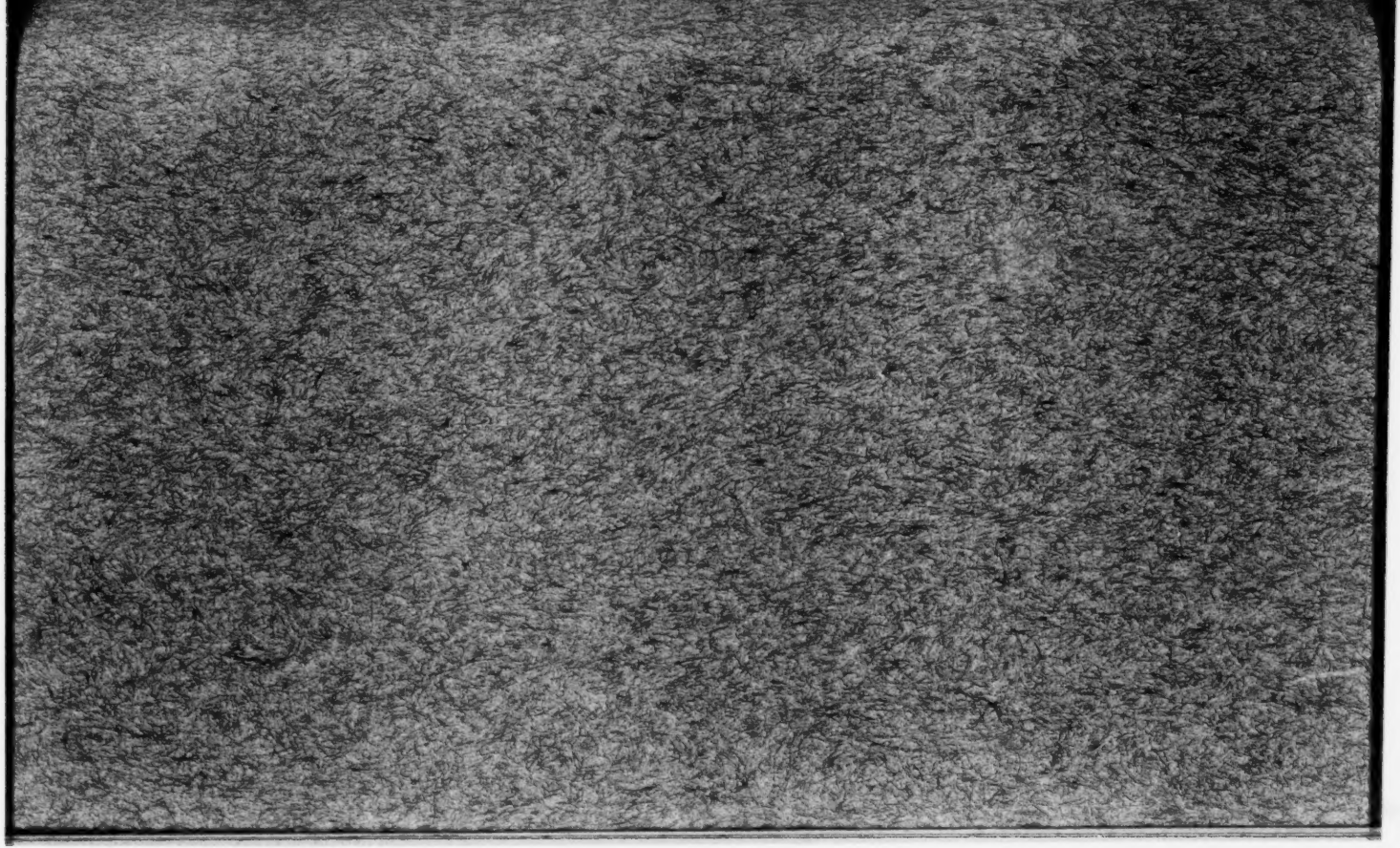

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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 966

R. BERNARD DICKEY, PETITIONER

*v.*

RAISIN PRORATION ZONE NO. 1, RAISIN PRORATION ASSOCIATION, ARTHUR C. BLAYNEY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA*

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## BRIEF FOR THE RESPONDENT COMMODITY CREDIT CORPORATION

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### OPINIONS BELOW

The Superior Court of Fresno County, California, did not render an opinion. The opinion of the District Court of Appeal (Fourth Appellate District) of California, not contained in the record, is reported in 140 Pac. 2d 53. The opinion of the Supreme Court of California en banc (R. 99–120) is reported in 24 A. C. (Cal.) 791.

### JURISDICTION

The opinion of the Supreme Court of California en banc was filed on August 31, 1944 (R.

99–120). A petition for rehearing, filed on September 15, 1944 (R. 120–125), was denied by the court by an order filed on September 28, 1944 (R. 125). The time within which to file a petition for a writ of certiorari was extended by orders of Mr. Justice Douglas to and including February 20, 1945 (R. 125, 126, 127). The petition for a writ of certiorari was filed on February 20, 1945. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether the pledge agreement involved in this proceeding, whereby raisins delivered into a Surplus Pool under the provisions of the California Agricultural Proration Act of 1933 were hypothecated to secure nonrecourse loans made available to any raisin grower contributing to the Surplus Pool, violated the due process or equal protection clauses of the Fourteenth Amendment to the Constitution as to nonborrowing growers who had been required to deliver raisins into the Surplus Pool.

### STATUTE INVOLVED

The applicable portions of the California Agricultural Proration Act of 1933, as amended, are set forth in the Appendix, *infra*, pp. 16–26.

### STATEMENT

The petitioner is a California raisin grower located within Raisin Proration Zone No. 1, an

area designated, pursuant to the provisions of the California Agricultural Proration Act of 1933, as amended. By resolution of the Program Committee for the Zone (R. 40–41), adopted under the authority of the Proration Act on September 12, 1938, the petitioner and all other raisin growers in the Zone were required to deliver 20 per cent of their 1938 production of raisins into a Surplus Pool for the purpose of stabilizing market conditions in the raisin industry and insuring reasonable prices to such producers for the remainder, or "free tonnage", of their production (R. 40).[1]

To aid in the effectuation of these purposes, the Program Committee for the Zone, the Raisin Proration Association, and the Commodity Credit Association, an agency of the United States, executed a pledge agreement on October 15, 1938 (R. 41, 43), whereby the Commodity Credit Corporation agreed in pursuance of a resolution earlier adopted by it (R. 44–52) to advance a fund not exceeding $9,000,000 to be made available to all Zone raisin growers in the form of non-

[1] In *Parker* v. *Brown*, 317 U. S. 341, this Court considered in some detail the operation of the raisin industry and the history and provisions of the Proration Act as applied thereto in sustaining the Act against contentions that it was rendered invalid by certain federal legislation or the commerce clause of the Constitution. The Act's constitutionality under both federal and state constitutions was sustained by the California Supreme Court in *Agricultural Prorate Commission* v. *Superior Court*, 5 Cal. 2d 550, 55 Pac. 2d 495.

recourse loans on their free tonnages at a fixed price of $50 per ton, on condition that the Zone hypothecate the raisins in the Surplus Pool as part security for the nonrecourse loans. Subsequently, growers representing 52.74 per cent of the Zone's 1938 raisin production obtained such nonrecourse loans (R. 81). In amount, the loans approximated $3,000,000 (R. 34).

On March 21, 1940, the petitioner, a nonborrower, instituted this proceeding in the Superior Court of Fresno County, California, on behalf of himself and all other growers "similarly situated", against the Zone, its officials, the Commodity Credit Corporation and certain other parties, some of whom were subsequently dismissed as defendants to the suit (R. 77–78). Petitioner's complaint (R. 1–10) set out the delivery of 20 per cent of the 1938 raisin production of each individual grower into the Surplus Pool, and the hypothecation of this pool to secure the Commodity Credit Coporation's nonrecourse loans on free tonnage raisins. The complaint further alleged in substance that petitioner and his co-contributors to the Surplus Pool "were and are the beneficial co-owners of the raisins, and other assets, of said Stabilization [Surplus] Pool" (R. 4), and that the pledge agreement with the Commodity Credit Corporation constituted an "illegal and unauthorized effort and plan to deprive plaintiff and the other beneficial owners of said pool of their property and rights as aforesaid" (R. 8).

Finally, the complaint alleged that neither petitioner nor those he claimed to represent in his action had consented to or ratified the pledge agreement; that a number of Surplus Pool raisins had been sold by the Zone and the proceeds paid over to the Commodity Credit Corporation to be applied on account of the nonrecourse loans; that a sale of the remaining surplus raisins was imminent; and that the amounts so realized would have to be applied, under the allegedly illegal pledge agreement, to make the Commodity Credit Corporation whole for large losses sustained on the nonrecourse loans (R. 7). There is no allegation in the complaint that the execution or enforcement of the pledge agreement invaded or would invade petitioner's constitutional rights under any part of the federal or state Constitution.

The complaint prayed that the court declare the pledge agreement illegal and void; that it enjoin the defendants from disposing of surplus pool raisins or proceeds from the sale thereof to the Commodity Credit Corporation; for an accounting and the appointment of a receiver; and for attorneys' fees (R. 8–10).

The Commodity Credit Corporation, Raisin Proration Zone No. 1, and the other defendants filed demurrers to petitioner's complaint (R. 10–24) which were overruled by the Superior Court of Fresno County on March 5, 1941 (R. 24). Thereupon the defendant Commodity Credit Corporation on June 19, 1941, and certain other

defendants on June 24, 1941, filed answers (R. 25–52, 53–64), alleging as a first defense (R. 25–28, 53–56) the validity of the pledge agreement averring in part that "the raisins in said [surplus] pool were held, controlled, and disposed of by the Program Committee in accordance with the provisions of the Agricultural Prorate [Proration] Act of 1933, as amended, and that the relationship of plaintiff and the other depositors to, and the rights and interests in, said stabilization [surplus] pool were those relationships, rights and interests determined and given by said Agricultural Prorate [Proration] Act of 1933, as amended, and by the actions of the Zone, the members of the Program Committee, the Raisin Proration Association, and the directors thereof, relating to said stabilization [surplus] pool raisins" (R. 26, 54). Various affirmative defenses in bar to the action were likewise pleaded by the defendants (R. 28–40, 56–63). On July 24, 1941, petitioner filed separate demurrers to the answers of the Commodity Credit Corporation (R. 65–67) and Raisin Proration Zone No. 1, and other defendants (R. 70–71), and on the same date he filed a motion for judgment on the pleadings (R. 73). On November 26, 1941, the Superior Court of Fresno County, California, issued its order sustaining petitioner's demurrers to defendants' answers, striking the defendants' affirmative defenses, and granting petitioner's

motion for judgment on the pleadings (R. 73–74). Thereafter, the court issued an interlocutory order and decree dated January 22, 1942 (R. 74–77), and on August 7, 1942, it handed down a final judgment and decree adjudging the pledge agreement to have been unauthorized, illegal and void, and appointing a receiver to distribute the proceeds from the sale of Surplus Pool raisins to the contributing growers in accordance with a formula established by the court (R. 87–91).

Upon appeal, the Supreme Court of California entered an opinion (R. 99–120) which reversed the judgment and directed the trial court to enter judgment dismissing the complaint. The opinion proceeded upon the ground that the Zone's authority to enter into the pledge agreement was necessarily implied under the Proration Act "as incidental to the express powers granted to the Proration Program Committee for the effectuation of an adequate marketing plan" (R. 103). Thereafter, on September 15, 1944, the petitioner filed a petition for a rehearing in the Supreme Court (R. 120–125), asserting for the first time in these proceedings that a construction of the Proration Act validating the pledge agreement would deprive petitioner of his property, and deny him the equal protection of the laws, in contravention of the Fourteenth Amendment to the United States Constitution (*cf.* Pet. Br., Appendix, pp. III–XXII). On September 28,

1944, the court entered an order denying the petition for rehearing without opinion (R. 125).

ARGUMENT

Substantial doubt may be expressed whether the record herein establishes that the Court has jurisdiction to review the decision of the California Supreme Court under the provisions of Section 237 (b) of the Judicial Code. Neither in his pleadings nor at any time prior to the filing of his petition for rehearing in the court below did petitioner raise any federal question,[2] nor did the

[2] Petitioner has included in the printed record an "Excerpt from brief for respondent Dickey" (R. 97–98) wherein it is variously stated that "the interpretation [of the Proration Act] contended for by appellants [respondents here] would render this legislation unreasonable and unconstitutional;" that it would "contravene all settled principles of due process," and that it would "render this legislation constitutionally indefensible" (R. 98). Even assuming such excerpt from a state court brief is properly a part of the record before this Court and sufficient in some circumstances to establish its jurisdiction (but see *Live Oak Water Users' Ass'n* v. *Commission*, 269 U. S. 354, 358–359; *Zadig* v. *Baldwin*, 166 U. S. 485, 488; *Harding* v. *Illinois*, 196 U. S. 78, 84), the present excerpt fails to demonstrate that the validity of the Proration Act as here applied was "drawn in question * * * on the ground of its being repugnant to the Constitution" or that "any title, right, privilege or immunity" had been "specially set up or claimed by either party under the Constitution * * *," before the state court so as to establish the jurisdiction of this Court under Section 237 (b) of the Judicial Code. Not only does the excerpt in general fail to contain any specific claims of federal right or reference to any specific section of or amendment to the Constitution (see *Michigan Sugar Co.* v. *Michi-*

Supreme Court of California pass upon or decide any federal question. Since the petition for rehearing was denied without opinion, the record fails completely to afford any jurisdictional basis for an exercise of this Court's supervisory powers. *Live Oak Water Users' Ass'n* v. *Commission*, 269 U. S. 354, 357; *Gelkom Realty Corp.* v. *Young Women's Hebrew Ass'n*, 296 U. S. 537, and cases cited. Petitioner has, however, included as an appendix to his brief a certificate of Phil S. Gibson, Chief Justice of the California Supreme Court (Pet. Br., Appendix, p. I), to the effect that the court passed upon and rejected the contention raised in the petition for rehearing that petitioner was being denied the protection of the Fourteenth Amendment.[3] That certificate does

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*gov.*, 185 U. S. 112, 113–114; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248, and cases cited; *Maxwell* v. *Newbold*, 18 How. 511, 516; cf. *York Heating & Ventilating Corp.* v. *Melody*, 296 U. S. 533), but the one reference to a denial of "due process" will be construed to refer solely to the cognate guarantees contained in the California Constitution, Art. I, Sections 1, 13, 14. *Bowe* v. *Scott*, 233 U. S. 658, 664–665; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 328; *Levy* v. *Superior Court of San Francisco*, 167 U. S. 175, 177; see *Agricultural Prorate Commission* v. *Superior Court*, 5 Cal. 2d 559, 572; 55 Pac. 2d 495, 506; cf. *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 69. And it will be noted that the citations in the excerpt are to California decisions exclusively.

[3] The petition for rehearing as it appears in the record (R. 120–125) fails to disclose that petitioner adverted to the Fourteenth Amendment. The only language there appearing is that the court's decision presents "a most serious question of constitutionality"—a statement which entirely

not purport to be issued on behalf of the court (cf. *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596, 599; see Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1936), p. 128) nor to be part of the record in the instant case. The function of a certificate, when properly incorporated in the record, is to enable this Court to see that the federal question was properly raised and was necessarily determined (*Honeyman* v. *Hanan*, 300 U. S. 14, 18), and it has been held that a certificate of the presiding justice of a state court is insufficient to establish that the court may not have denied the application for rehearing in the mere exercise of its discretion or declined to pass on the claim of unconstitutionality because it was not raised in time.[4] *Fullerton* v. *Texas*, 196 U. S. 192, 194; cf. *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 596;

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lacks the requisite specificity (see fn. 2, *supra*, pp. 8–9). Reference must be made to the matter appearing in the Appendix to petitioner's brief before it can be determined whether, in his petition for rehearing, petitioner relied upon the federal or state Constitution, and what part thereof.

[4] As to the distinction generally between certificates of this nature of the state court and certificates to the same effect by the presiding judge thereof, see note 1 of the opinion in *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, No. 400, this Term, decided February 26, 1945, and the text therein annotated.

but see *Lisenba* v. *California,* 314 U. S. 219, 221–222, where the certificate was specifically made a part of the record.

If this Court concludes, however, that the federal question was properly raised, we submit that the question lacks substance. The petition for a writ of certiorari filed in the instant case, and particularly the brief in support thereof, consists in large part of attacks upon the reasoning and "assumptions" of the California Supreme Court in holding that the questioned pledge agreement was within the competence of the Program Committee under the state statute, and in dismissing petitioner's complaint upon those grounds. It is axiomatic, however, that the construction of a state statute is peculiarly within the province of the state courts and its interpretation thereof is conclusive. *Knights of Pythias* v. *Meyer,* 265 U. S. 30, 32–33; *Sage Stores Co.* v. *Kansas,* 323 U. S. 32, 35. Accordingly, the only question presented is whether the power granted in a state statute to hypothecate impounded surplus agricultural production—"agricultural waste" in the definition of the Act—for the purpose of stabilizing prices for, and enhancing the marketability of the remainder of the crop constitutes such a radical departure from approved regulation under the police powers of a state as to render the statute

unconstitutional in that respect.[5] We submit that it does not.

In *Parker* v. *Brown,* 317 U. S. 341, in which the Proration Act was sustained against a challenge that its operations unconstitutionally burdened interstate commerce, this Court, in reviewing the underlying conceptions motivating its passage stated (*id.* 363–367):

> Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries. * * *
>
> The history of the industry, at least since 1929, is a record of a continuous search for expedients which would stabilize the marketing of the raisin crop and maintain a price standard which would bring fair return to the producers. * * *
>
> * * * * *

---

[5] Petitioner's contention (Pet. Br. pp. 15, 19) that the court below violated his rights in ordering a dismissal of the complaint rather than affording him opportunity to attack its "unwarranted assumptions," allegedly based on the Commodity Credit Corporation's answer, in a trial in the Superior Court, is footless. The court held that the complaint failed to state a cause of action (R. 116), and the allegations of the answer accordingly are of no moment.

> This history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop * * * is a problem whose solution is peculiarly within the province of the state. In the exercise of its power the state has adopted a measure appropriate to the end sought.

While the foregoing statements were made with reference to the commerce clause, identical considerations amply demonstrate that the pledge agreement was legitimately conceived with relation to the evil sought to be alleviated. *Sage Stores Co.* v. *Kansas,* 323 U. S. 32.

The practical effect of the pledge transaction obviously was to prevent a demoralization of the market at harvest time when many growers, to realize upon an investment of months' standing, would have had to dispose of their free tonnages as quickly as possible because of financial necessity. Thus, the Surplus Pool, which in the first instance constituted "agricultural waste" withdrawn from the market to prevent a disastrous glut, was effectively utilized to secure financing which pegged the price of 1938 raisins at not less than $50 per ton.[6] The resultant stabilization of

[6] This figure barely covers the cost of production for the most efficient producer. See *Parker* v. *Brown,* 317 U. S. 341, 364, note 10. Petitioner's statements that the pledge agreement was "unnecessary" would seem specious in view of the fact that growers representing over 50% of the Zone's 1938 raisin production obtained the financing thus made

the market and the approach to a price standard which would bring a fair return to the producers were exactly those ends sought to be achieved by the enactment of the Proration Act. *Parker* v. *Brown,* 317 U. S. 341.

Petitioner does not challenge the constitutionality of the Proration Act generally (cf. Pet. 25), but only the validity of the pledge agreement. Yet under the explicit provisions of the Act (sustained as to its constitutionality in *Agricultural Prorate Commission* v. *Superior Court,* 5 Cal. 2d 550; 55 Pac. 2d 495), petitioner's asserted "property rights" in the impounded surplus raisins are of such nebulous character as to render it doubtful that any disposition of the pool would constitute a substantial deprivation. Cf. *Fox River Paper Co.* v. *R. R. Commission,* 274 U. S. 651. The pool raisins are not to be marketed "in any form which would directly compete with that part of the crop [*i. e.,* the free tonnage] which is regularly certificated," and the program committee for the Zone is specifically authorized to turn over the surplus "to charitable organizations, self-help cooperatives, and similar agencies" under proper safeguards to prevent the surplus from competing

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available, and the fact that on ultimate disposition of the free tonnage raisins upon which loans were made, the Commodity Credit Corporation suffered a large loss (see Statement, *supra,* pp. 4, 5).

with the marketable crop (Proration Act, Section 19.1).[7]

In the light of the public ends served by the pledge of the pool raisins and the insubstantial property right of petitioner therein, petitioner's contention that the hypothecation of the entire pool constitutes, insofar as his share is concerned, an unlawful taking within the meaning of the Fourteenth Amendment would seem to be clearly foreclosed by the decisions of this Court. *Noble State Bank* v. *Haskell,* 219 U. S. 104; *Nebbia* v. *New York,* 291 U. S. 502; *United States* v. *Rock Royal Cooperative, Inc.,* 307 U. S. 533; cf. *United States* v. *Darby,* 312 U. S. 100; *Olsen* v. *Nebraska,* 313 U. S. 236; *Wickard* v. *Filburn,* 317 U. S. 111. Viewed against the background of the industry, graphically described in *Parker* v. *Brown,* as an exercise of power in an emergency period, the decisions in *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, and *Bowles, Administrator* v. *Willingham,* 321 U. S. 503, make the matter even more conclusive.

[7] The pledge agreement provided this protection. Section 4 of the agreement (R. 43) provided that the Commodity Credit Corporation might dispose of the pledged raisins, subject, however, "to the same restrictions as if such raisins were sold or otherwise disposed of by the Committee or the Association." Actually, the pledged raisins were ultimately sold to the Federal Surplus Commodities Corporation for relief distribution. See *Parker* v. *Brown,* 317 U. S. 341, 366.

## CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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MARCH 1945.

# APPENDIX

California Agricultural Proration Act [Stats. 1933, p. 1969; amended by Stats. 1935, pp. 1526, 2087].

Section 1. The unreasonable waste of agricultural wealth occasioned by the harvesting, preparation for market and delivery to market of greater quantities of agricultural commodities than are reasonably necessary to supply the demands of the market is opposed to the public interest and the difficulty inherent in any attempt by individuals to correlate within a reasonable degree the supply of any agricultural commodity to current consumptive demands is creating chaotic economic conditions in certain agricultural areas of the State of such severity as to imperil the ability of agricultural producers to contribute in appropriate amounts to the support of ordinary governmental and educational functions, thus tending to increase and increasing the tax burdens of other citizens for the same purposes. In the interest of the public welfare and general prosperity of the State, the unnecessary and unreasonable waste of agricultural wealth, hereinafter referred to as "agricultural waste," involved in the harvesting or preparation for and delivery to market of agicultural commodities for which there exists only a limited consumer demand should be eliminated while at the same time preserving to all agricultural producers an equality of opportunity in the available markets. [Amended by Stats. 1935, p. 1527.]

Sec. 2. As used in this act:

(a) The term "person" includes any individual, firm, association or corporation.

(b) The term "agricultural waste"—in addition to their ordinary meaning—shall include economic waste, and waste incident to the harvesting and/or preparation for any delivery to market of agricultural commodities in excess of reasonable market demands.

* * * * *

(d) The terms "proration zone" or "zone" mean any district or districts with respect to which a program of market proration is proposed to be or has been instituted.

* * * * *

(l) The term "owner" means the person in possession of agricultural commodities and legally entitled to dispose of the same for marketing purposes.

(m) The term "proration" means the uniform percentage of their total production which all producers may harvest and prepare for market and/or market.

* * * * *

Sec. 8. An agricultural prorated marketing program may be based either upon a producing zone or upon a market zone, the basis to be specified in the petition therefor. A program for the prorated marketing of a variety or kind of agricultural commodity may be initiated by presenting a petition therefor to the commission. Such petition shall indicate whether it is proposed that such program be instituted by an order of the commission or by an election by qualified producers.

The said petition shall, among other things contain:

(1) A legal description of the district or districts comprising the zone upon which the proposed marketing program is to be based, together with a map thereof.

(2) A general statement of facts showing the necessity for the institution of a prorated marketing program.

(3) If such petition propose an election by qualified producers, the signatures of not less than fifty qualified producers of said kind or variety of agricultural commodity within the proposed producing zone or supplying the proposed market zone, as the case may be, shall be sufficient. If such petition propose that a program be instituted by order of the commission, the signatures of not less than two-thirds of the qualified producers of said kind or variety of agricultural commodity and of the owners of not less than fifty-one per cent of the producing factors within the proposed producing zone or supplying the proposed market zone, as the case may be, shall be required. Wilful misrepresentation of any fact in signing such petition shall be unlawful.

There shall also be filed with said petition a good and sufficient undertaking to be approved by the commission, in double the amount of the probable cost of conducting the hearing of the petition by the commission, conditioned that the sureties will pay all such costs in case the petition be denied.

The signatures to said petition may be either in person or by duly authorized agent or representative. Any nonprofit cooperative marketing agency or any cooperative, or other agricultural marketing agency may sign such petition if specifically authorized by the producers for whom such cooperative,

nonprofit cooperative or agricultural marketing agency purports to sign; provided, however, such authorization shall be by an instrument other than the marketing contract or shipping contract.

In the case of horticultural or viticultural products, each producer shall be entitled to sign for the number of producing factors specified in the petition, which he produced during the preceding season, or, in the case of vegetable products or livestock and poultry and their products, the producing factor shall be based upon the actual acreage planted or livestock owned or the products thereof produced at the time he signs the petition.

It shall be a misdemeanor to obtain or prevent signatures to any petition by threats to curtail credit, call loans, refuse to purchase crops or by any other form of coercion whatsoever.

Certificates of county agricultural commissioners as to the number of producers, acres or other producing factors engaged in the production of any variety or kind of commodity in their respective counties shall be prima facie evidence of the facts therein stated. [Amended by Stats. 1935, p. 1530.]

Sec. 9. Upon the receipt of a petition for the establishment, annexation or termination of a prorate program, the commission shall hold a hearing at some central point located within the district described in said petition and proposed to be established as a proration marketing zone. The names and addresses of all producers claimed by petitioners as being producers shall be filed and opened to public inspection by any interested party not less than twenty days prior to the hearing in the agricultural

commissioner's office in each county or portion thereof in the proposed zone. Notice of such hearing shall be given at least ten (10) days prior thereto by publication in a newspaper of general circulation printed and published in each county affected and by posting in at least ten (10) conspicuous places in said district. In case the proposed proration zone includes more than one district the required notice shall be given in each district and the commission shall hold hearings in each of said districts. At said hearings the commission shall receive and hear the evidence offered by the petitioners in support of the petition and by any interested person in opposition thereto.

All evidence and exhibits and all facts and data used directly or indirectly by the commission, or introduced at a hearing, shall within a reasonable time after being so used or so introduced be available at a central point to all interested parties.

Said hearings may be adjourned from time to time and from place to place as the circumstances may require. A transcript of the proceedings at all such hearings shall be made by the commission and shall be opened to inspection by any interested party.

If no paper is published in such district, then said notice shall be published in such paper as is published in the county and has general circulation in such district. [Amended by Stats. 1935, p. 1532.]

* * * * *

Sec. 11. If it shall be alleged in said petition that it is signed by two-thirds or more of the producers of the commodity named in the petition within or serving the zone described, and by the owners of fifty-one percent or more of the producing fac-

tors within or serving said zone, proof shall be required in support of such allegation and the commission shall make a finding with respect thereto. If it shall find such allegation to be the fact, and shall find to exist all of the other facts specified in section 10 of this act, the commission shall forthwith make an order declaring the proposed program instituted and specifying the zone in which the program shall be effective. [Amended by Stats. 1935, p. 1533.]

* * * * *

Sec. 17. Any order of the commission instituting a proration program and any other order of the commission substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within thirty days after the effective date of the order complained of or within thirty days after the injurious effect complained of. [Amended by Stats. 1935, p. 1535.]

Sec. 18. In the event of the institution of a marketing program in a proration zone, it shall be the duty of the commission to forthwith select a proration program committee of five producers and two handlers operating within the zone. The producer members of said program committee shall be chosen by the commission from a group of fifteen nominees who are to be nominated by the producers. The commission in the selection of the program committee, shall take cognizance of and, in so far as possible, give representation upon such committee to the various geographical areas or districts coming under the proration program. No producer member of the program committee shall be a handler or processor or an em-

ployee or officer of a handler or processor, except that a nonprofit cooperative organization may be represented by officers or directors who are producers, providing that no more than three such producer members of the prorate program committee shall be members of the same nonprofit cooperative organization. In the case of commodities, the bulk of which is processed before consumption, one of the producer members of said program committee shall be a processor. In the event that the commission shall be of the opinion that a committee of seven will not afford adequate representation to all of the factors in the industry concerned, it may appoint a program committee of six producers and three handlers provided said producers are selected from the list of nominees selected by the growers as provided for herein. The members of such program committee shall not be entitled to compensation but may be reimbursed their actual and necessary traveling expenses. Such prorating program may be altered or modified from time to time by such committee.

Upon request of petitioners for the institution of a program or of a program committee therefore, the commission shall also appoint in the same manner as the program committee was appointed an alternate for each member of the committee. Such alternate shall be entitled to sit as a regular member of the committee in case the member for whom he is an alternate fails for any reason to attend any meeting of the committee.

Vacancies on the program committee occasioned by the death or resignation of any member, or by removal for incompetency or inattention or neglect of duties as a member

of the program committee by the commission, or by a member ceasing to qualify as a producer or handler of the commodity concerned, shall be filled in the same manner as the original appointments were made.

The program committee shall appoint an agent, who shall administer the proration program under the direction of the program committee and who may be removed from office in the same manner as he was appointed.

Pending action by the commission on the approval of any such agent, he shall act as such and shall appoint such deputy agents and other assistants as may be necessary to properly direct the program. Such agent shall appoint such deputy agents and other assistants as may be necessary to direct the program which appointments shall be subject to the approval of the program committee. The salary and/or compensation received by the secretary shall not exceed the sum of five thousand dollars ($5,000) per annum from all sources and no officer or employee shall receive compensation based on a percentage of volume involved in a prorate program, or in any manner that would lend encouragement to the promotion of a proration program for the purpose of increasing salaries and income. [Amended by Stats. 1935, p. 2088.]

Note.—This section was also amended earlier during the same session of the Legislature. See Stats. 1935, p. 1536.

* * * * *

Sec. 19.1. In any marketing program approved by the commission, a program committee shall be empowered to determine the method, manner and extent of proration and the movement of the prorated commodity

from harvest into a primary channel of distribution. Proration may be periodic or seasonal in character and may be based upon actual production, whether in storage or otherwise, or upon estimated production. The estimated production shall be subject to revision by the program committee in accordance with crop and market conditions. In estimating production a program committee shall give consideration, among other factors, to the normal production of the various producing units. The program committee, for the purpose of minimizing the effect of existing surpluses upon market conditions, shall be empowered in any or all of the following particulars:

(a) To establish and maintain surplus pools which shall be authorized to receive from each producer from time to time his surplus of the prorated commodity and market the same by grades for the account of the producer when it can be advantageously disposed of either in its original or some converted state: provided, however, such surplus shall not be marketed in any form which would directly compete with that part of the crop which is regularly certificated; and provided, further, that any part of any such surplus may be turned over by a program committee to charitable organizations, self-help cooperatives, and similar agencies under proper safeguards to prevent any part of the commodity so disposed of from directly competing with the part of the crop marketed through the usual channels of trade. In operating any such surplus pool, a program committee may fix grading, packing, and servicing charges to be assessed against such com-

modities received by the pool and requiring such handling. The program committee shall handle all commodities received by a surplus pool and account for the same on a pooled basis. Each producer delivering his surplus to a pool shall be credited for his proportionate share of the surplus so delivered.

(b) To create, establish or otherwise obtain and operate facilities for the grading, packing, servicing, processing, preparing for market and disposal of such surplus in such manner as to maintain stability in the markets and to sell such surplus and/or any of its derived products.

(c) To appoint and empower subcommittees in the separated producing areas within the zone to facilitate the carrying out of the purposes of this act.

(d) To collaborate and cooperate with agencies or organizations with similar purposes, whether of this State, other States or of the United States, in the formulation and execution of a common marketing program; provided, that in proper cases the commission may require such collaboration and cooperation.

(e) To minimize an existing surplus by cooperating with the proper agencies in the enforcement of applicable existing standardization or other laws of this State, and of the United States, enacted to protect the consuming public from fraud or deception.

(f) To create, maintain and disburse an equalization fund to be used for the removal of any inequalities between producers as to the total volume marketed

through prorated channels resulting from errors in estimating production or surplus.

The cost of the exercise of such powers as are herein granted to the program committee shall be a part of the cost of the operation of the program and shall be obtained through fees in the same manner as other costs of the program. [New section added by Stats. 1935, p. 1537.]

U. S. GOVERNMENT PRINTING OFFICE: 1949

# In the Supreme Court
OF THE
# United States

Office - Supreme Court, U. S.
FILED
MAY 3 1945
CHARLES ELMORE CROPLEY
CLERK

OCTOBER TERM, 1944

**No. 966**

R. BERNARD DICKEY,
*Petitioner,*

vs.

RAISIN PRORATION ZONE No. 1, a proration zone organized under the laws of the State of California, et al.,
*Respondents.*

**PETITION FOR A REHEARING OF**
**PETITION FOR WRIT OF CERTIORARI**
**to the Supreme Court of the State of California**
**and**
**BRIEF IN SUPPORT THEREOF.**

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# In the Supreme Court
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OCTOBER TERM, 1944

No. 966

R. BERNARD DICKEY,
*Petitioner,*

vs.

RAISIN PRORATION ZONE No. 1, a proration zone organized under the laws of the State of California, et al.,
*Respondents.*

**PETITION FOR A REHEARING OF**
**PETITION FOR WRIT OF CERTIORARI**
**to the Supreme Court of the State of California**
**and**
**BRIEF IN SUPPORT THEREOF.**

*To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:*

Petitioner respectfully petitions this Court to rehear the petition for a writ of certiorari to the Supreme Court of the State of California in the above entitled cause. The petition for the writ was denied by this Court on April 10, 1945. (13 United States Law Week 396.)

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1. REASONS FOR REHEARING.

The petitioner urges a rehearing because of the great importance of the issues involved and further because several aspects of the constitutional question raised by the petitioner, the respondent in the Court below, may not have been presented with sufficient clearness and emphasis in the original petition.

The petitioner does not question the constitutionality of the Prorate Act of California as a whole. (Agricultural Prorate Act of 1933; Stats. 1933, p. 1969 as amended.) He does not question the constitutional power of the State to establish a marketing program and to make it compulsory upon all raisin growers, including those on whose behalf petitioner brings this representative suit. He does not deny that the State in pursuance of such a marketing program may withdraw a certain percentage of the raisin crop from the market for a time, and dispose of that percentage in such a way and at such a time as will be most bene-

ficial to the public and to the raisin growers themselves.

In view of applicable decisions of this Court, no question can be raised in these matters so long as the property taken from any particular raisin grower is held by the Zone or by any instrumentality selected by the Zone, for the owner and on his behalf; and so long as the ownership and enjoyment of the commodity and the fruits of his labor are not arbitrarily taken from him.

Nor would the petitioner here complain even if his title and ownership were divested in the public interest, provided it was in accordance with the constitutional provision, contained in the Fifth Amendment to the Constitution of the United States, that private property may not be taken for public use except on just compensation. The exercise of the right of eminent domain is an integral part of governmental power, and the methods by which it is to be done and by which compensation must be fixed, are set forth in many statutes and many decisions of this Court.

But the petitioner feels that he has made insufficiently clear to this Honorable Court that the taking of this property in this instance through this pledge-agreement, authorized by the Prorate Act as that Act has been interpreted by the Supreme Court of California in the case here sought to be reviewed, was not for a public but for a private purpose, so that with or without compensation it would have been in violation of the Constitution; and, further, that if it was for a

public purpose no compensation whatever has been given or offered or declared to be due to the petitioner by the State of California and no opportunity whatever has been granted to the petitioner to be heard on the amount of compensation.

The result of the pledge-agreement, which petitioner never signed and never authorized, was that a substantial portion of his crop was pledged by the Prorate Zone to secure, not his own obligation to the Zone, but the obligation of other persons who had borrowed money from the Commodity Credit Corporation. The interest of these borrowers in the surplus stock held by the Zone was deemed by the Corporation insufficient security for the loan. The Zone therefore took the property of the petitioner, so far as it was represented by his interest in the surplus, and pledged it as additional security for a loan made not to him but to other persons. If this had been done without warrant of any statute, it would have been clearly a violation of the Zone's duty as trustee of the petitioner's share in the surplus. If, as held by the Supreme Court of California, it was authorized by Section 19.1 of the Prorate Act, that section, it is submitted, so far as it authorizes this seizure, is plainly unconstitutional.

It is clear that the persons who benefit by taking the petitioner's property are the growers who borrowed money from the Corporation, not the public. The petitioner borrowed no money. He was not consulted about the loans for which his property was taken as security. He at no time assumed any obliga-

tion for these loans, either as principal or as surety. He could not be sued upon them. If there were a deficiency on foreclosure of the lien, he would not be liable for it. And yet without his consent to the loans or his participation in the contracts which created them, he is saddled with an obligation for them in the most drastic fashion known to the law, and is deprived of a valuable interest, so that other and less efficient growers, unable to borrow money on their own credit, may enjoy the fruits of his more efficient labors.

That is certainly not in accordance with the concept of property as it is maintained in our economic system. Our law does not impose as a legal obligation on individuals, the duty of assisting all necessitous persons who have happened to go into the same sort of business. If the petitioner had gone into partnership with those who borrowed money from the Commodity Corporation and had had some voice in the way they managed their affairs, a mutual responsibility could be assumed. But that is decidedly not the case. He is in no way responsible for the fact that these raisin growers are unable to borrow money either on their personal credit or on the security of their share in the raisin pool.

It may well be in the public interest that persons unable to borrow money, should be provided with facilities for borrowing in order to maintain themselves in business and prevent general financial distress. But such facilities, it is submitted, should be provided from public funds as is done by the Recon-

struction Finance Corporation (15 U. S. Code Annotated, Chapter 14, §§ 601-617) and has been done by other public agencies. Indeed, the Reconstruction Finance Corporation is authorized to make loans to farmers and these loans are properly secured only on the crops of those to whom loans are made. (15 U. S. Code Annotated, 602.) Certainly there is neither reason nor justice in placing the entire weight of this public duty on a relatively small number of persons who already bear their full share of the tax burden necessary to support these agencies.

In fact, it is not the public whose interest is being served by what amounts to a confiscation of the petitioner's share in the raisin surplus, but solely the interest of the individual borrowers. To say, as the Government does in this case, that to increase the borrowing capacity of those who cannot raise money on their private credit, is a sufficient public interest to come within the police power, can hardly be taken as a serious argument. By parity of reasoning all funds deposited in any bank could be taken as security, whenever any depositor borrows from the bank. And to lend money is the function of banks. The constitutional way to provide for the public purpose insisted upon by the Government in this case, is by means of general taxes uniformly and justly apportioned among all taxpayers, not by the arbitrary seizure of the property of selected private individuals.

## 2. THE SPECIAL CHARACTER OF THE PROPERTY HERE TAKEN.

The property taken from the petitioner for the benefit of other growers is of a special sort. If we assume that title to the surplus raisins vested in the Zone, this legal title is obviously held—it is expressly so stated—for the growers who have been required to contribute their surplus. Indeed, if that were not the case, since this is not a condemnation under eminent domain, even the vesting of the legal title in the Zone is subject to the beneficial interest of the growers in the surplus thus taken. Upon the beneficial interests of the growers in the surplus thus taken, the statute, as interpreted by the Supreme Court of California, imposes a lien. To impose a lien is the diminution of the property rights of the owner. It can be done by the direct act of the owner and in certain special cases it can be done by statute. It is submitted that under applicable decisions of this Court and other American Courts, the situations in which a lien may be impressed by statute are strictly limited and exclude the situation created by this pledge agreement.

That the protection of property is one of the fundamental purposes of government has been frequently stated by this Court. As long ago as 1835 we find the solemn declaration:

> "It is now considered an universal and fundamental proposition in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private

> purposes at all, nor for public uses without just compensation."
>
> Nelson J. in *People v. Morris,* 13 Wend. 325, 328.

This fundamental proposition has never been denied in any decision of this Court and has never been seriously qualified, even in those cases where greatest stress has been laid on public needs. Nor is there any need of attributing sanctity to the institution of property. It is just as fundamental, if it is taken to be merely, as it is, an integral part of the economy of our country, and of all countries that have not become wholly socialistic. As Mr. Justice Holmes stated while on the Supreme Court of Massachusetts:

> "Property is protected because such protection answers a demand of human nature and therefore takes the place of a fight."

It is undoubtedly true that property rights have often been regulated and restricted in the public interest. But out of the very qualifications and limitations which our law has imposed on the unrestrained use of property rights, it becomes apparent how far beyond these restrictions is the situation presented by this case. In the following discussion the petitioner desires to lay stress only on those cases, in which, as under this pledge-agreement, a lien has been imposed by statute on particular kinds of private property which constituted important elements in the economy of particular communities.

Several of the states have statutes regulating logging operations. "Boom-companies" are chartered and licensed to regulate and facilitate the transportation of logs from the places where the timber is cut to the sawmills. In many of the states the surveyor general was charged with the duty of surveying and scaling logs, and to secure his fees, he was given a lien on all the logs that pass through the boom, not merely on the logs to the extent that he had actually surveyed them.

In the case of *Lindsay & Phelps Co. v. Miller,* 176 U. S. 126, 20 S. Ct. 326, 44 L. Ed. 400, it was held that a statute of this sort in Minnesota was valid because the owners of the logs *voluntarily* used the boom, in order to send their logs down the river. It was quite possible to send the logs down without using the boom.

This voluntary act of the defendant was declared to be essential:

> "An important question is thus presented whether the logs of one party can be subjected to a lien for surveying and scaling not only his own logs, but also for surveying and scaling logs belonging to other parties. *This statement naturally suggests a negative answer and ordinarily it may be affirmed that no man's property can be subject to a lien for services rendered upon some other man's property.*" (pp. 143-144.)

The Court goes on to say that the validity of the lien in this case rests partly on the difficulty of separating the logs that came through the boom and charging each log with its share of the fees—a difficulty that does not exist in the situation of the raisin crop; and

chiefly because the owners of the logs had voluntarily used the boom.

> "It must be borne in mind," said the Court, "that while the lien is given for the services rendered, the use of the facilities of the boom is not compulsory. * * * In that way it may be said that any log owner may send his logs down the river without the use of the boom and when he decides to avail himself of the boom it cannot be said that he is deprived of his property without due process of law if he is compelled to subject it to the conditions that the legislature prescribes for the use of the boom." (p. 146.)

In the case cited, there was no question of the importance of logging operations in the State of Minnesota nor of the public purpose served by encouraging the service of boom companies. But even as against this public service, it was emphasized that except by the voluntary act of the owner no lien could be imposed. The Court of Minnesota speaking in another case of liens of subcontractors, says the following:

> *Meyer v. Berlandi,* 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777, 12 U. S. R. 163.
>
> "As liens are an incumbrance of the owner's property, it is fundamental that they can only be created by his consent or authority. No man can be deprived of his property without his consent, or by due process of law. The basis of the right to enforce a claim as a lien against property is the consent of the owner and it is upon this principle alone that laws giving liens to subcontractors have been sustained."

As another illustration of this doctrine in this Court, we may cite the case of

*Eiger v. Garrity*, 246 U. S. 97, 38 S. Ct. 298.

An Illinois statute created a lien on premises in which liquor was served in favor of a married woman if liquor was sold to her husband in those premises. This Court sustained the statute and did so for the following specific reason. It held that the owner could rent the premises to whom he desired "and safeguard himself by the amount of rent reserved or otherwise for the possible damages resulting from the traffic in intoxicants which the landlord has agreed may be carried on in his premises".

That is to say, even in a case involving a policy which at the time in question seemed of major social importance and was shortly after written into the Constitution itself, this Court felt itself unable to justify a statutory lien placed upon property owned by someone not liable for the obligation which the lien secured, except upon finding as a fact, and not as a presumption, that the owner had it in his power to escape liability or to meet the burden imposed on him.

No opportunity like this, the opportunity which in the logging case and in the saloon case, was made the basic reason for permitting the lien, was granted the petitioner. He could neither prevent the credit from being granted to growers unable to meet their own obligations, nor could he withdraw from the program which required him to contribute his share to the reserve pool. He must suffer a substantial loss of property, not because he has by a voluntary act assumed the

risk of such loss, as in the Supreme Court cases cited, but because other persons who have gone into the same business as he did, are regarded by the Zoning Authorities as dubiously solvent debtors.

While the doctrine that property may not be taken from private persons, without due process of law, has been frequently and emphatically asserted by this Court, this particular question, that is, the imposition of a lien which results in deprivation of property, has only rarely come before this Court. In the two cases mentioned, the *Lindsay Co.* case and the *Eiger* case, the Court sustained the lien for the express reason that it was based on voluntary acts of the property owner, acts which he was free to omit as well as to perform. The obvious inference is that if no such voluntary act were present, the Court would have rejected the lien, as indeed the Court declares it would.

It is submitted that this situation is directly before the Court in this case, and that a decision by this Court upon it would go far not only to clarifying the law but to the securing of legitimate property interests which this Court has at all times announced its policy of safeguarding.

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### 3. THE DOCTRINE APPLIED IN STATE COURTS.

In a number of other cases in which an undoubted public purpose was sought to be carried out, the Courts have refused to permit the imposition of liens where no contract or agreement or voluntary act of the property owner can be found. In the case of *Fed. Farm*

*Mortgage Co. v. Berzel,* 69 N. D. 760, 291 N. W. 550, a statute of North Dakota was before the Court. (Laws of North Dakota, 1919, Ch. 162, Sec. 8.) By this statute a lien was placed upon the property in which workers had been injured and this lien was made superior to earlier mortgage liens. The purpose, it was declared by the Court, was "to protect the Compensation Fund to the end that workers injured in hazardous employment might have the sure and certain relief contemplated".

Certainly there could be no more important public purpose. Nonetheless, the Court declared the law to be unconstitutional as in violation of the Federal as well as of the State Constitution, unless the mortgage holder accepted the mortgage with notice that his lien might be so subordinated; that is to say, unless, by a voluntary act, he assumed the risk of having his mortgage lien reduced in value. The provisions of the statute in this respect were, in the words of the Court, "unnecessary, drastic and arbitrary".

It is submitted that they are less drastic and arbitrary than this provision of the Act here challenged is, since, in the North Dakota case, the benefits accrue to the State, and in this case, they accrue to private persons; and, secondly, in the North Dakota case, the mortgagor has the chance of refusing a mortgage under the circumstances. No such chance is present here.

And just as in the North Dakota case, the provision is unnecessary. The compensation fund in that case was supported by a system of taxation. Similarly the

Commodity Credit Corporation which is to be secured by the petitioner's property, for loans made by the Corporation to other persons, is guaranteed against loss by the statute (U. S. Stat. July 16, 1943, 15 U. S. Code Ann. §§ 713a-4) and therefore does not need this additional security out of the property of non-borrowers.

Again in *Butler v. Sussman,* 221 Ind. 47, 46 N. E. (2d) 243, 245, a statute of Indiana (Stat. Ind. 1933, Ch. 195, Sec. 32) gave pawnbrokers a lien for advances even on articles stolen and thereafter pledged. The Courts held the law to be unconstitutional as in violation of both State and Federal Constitutions, even where the pledge had been made by a husband of articles belonging to his wife.

In two groups of statutes, i.e., mechanic's lien laws and the so-called "betterment" statutes, attempts have been made at various times to create liens or what are equivalent to liens, in the interest of persons who have added value to the property on which liens were claimed. Under these statutes there is an undoubted equity, since the property owner would otherwise be unjustly enriched.

Nevertheless even in such cases, in which a lien would be a far less drastic deprivation of property than in this case, the Courts have been careful to insist either on an estoppel or on the presence of something like an agreement or consent, and have invalidated those laws when, despite the equity, no estoppel or agreement could be found.

Thus in *Santa Cruz Co. v. Lyons,* 117 Cal. 212, 48 P. 1097, 59 U. S. R. 174, a California statute allowed a lien on land for work done upon or at the request of the "reputed" owner. This statute was held to be unconstitutional unless an estoppel were present. Said the Court:

> "He (i.e. the true owner) cannot be deprived of his title to the land, nor can a lien be imposed thereon against his will by virtue of any agreement or contract on the part of one who is merely reputed to be the owner of such land * * *
>
> "It is no more within the constitutional power of the legislature to authorize a reputed owner of a lot or parcel of land to create a lien thereon against the will of the true owner than it would be to authorize such reputed owner to transfer the title to said land."

Similarly in *Chears Co. v. Gidden,* 159 Miss. 288, 131 So. 426, it was held that the mechanic's lien statute could not constitutionally place a lien on the house of a married woman for services rendered on her husband's contract.

In order to protect those who have furnished labor and materials statutes have gone far. They have required owners of property, when the services have been rendered to occupants to give notice of non-responsibility in order to relieve their property from a lien imposed for the purpose of securing an obligation which they had not themselves incurred, but which the occupants had incurred. Even this much so far as it required an affirmative act to escape responsibility,

was held in some States to make the act unconstitutional. (Cf. *Meyer v. Berlandi*, 39 Minn. 438, and *Randolph v. Builders*, 106 Ala. 501, 17 So. 721, 724.) And where the law was sustained, it was sustained explicitly on the basis of the fact that the owner actually had an opportunity to avoid the lien. (Cf. *Smith v. McCoy* (1931), 58 S. D. 256, 235 N. W. 661.)

Similarly in the "betterment" statutes, in which liens have been imposed in favor of persons who had inadvertently built upon property belonging to others, the only basis that could be found is the equity involved in unjust enrichment. If the value of the property had been substantially enhanced, it seemed only fair to require that those who had in good faith enhanced it should be compensated. But where no enhancement existed or no good faith, no lien was permitted. Cf. such cases as

*Griswold v. Bragg*, 48 F. 518;
*Leighton v. Young*, 52 F. 439;
*Searl v. School District*, 133 U. S. 553, 561, 33 L. Ed. 740, 10 S. Ct. 374,

where the taking was by virtue of the right of eminent domain. Even then, when the statute became too drastic it was denied validity. So when a statute permitted the occupant claimant to remain in possession until the improvements were paid for, the law was declared to be unconstitutional.

*Bank of Hamilton v. Dudley's Lessees*, 2 Peters 492;
*Green v. Biddle*, 8 Wheat. 1;
*McCoy v. Grandy*, 3 Oh. St. 463;
*Childs v. Shower*, 18 Iowa 261.

From none of these cases can any support be found for the validation of the act of the Zoning Authority in imposing a lien on the property of the petitioner for the benefit of third persons. Nor can any established principle or doctrine of our law be cited which supports the contention that a statute can vest any governmental agency with such power. It goes beyond anything that has been proposed before and has no analogy in any recognized constitutional exercise of control over the property of American citizens.

When we further remember that the statute says nothing expressly about a loan program at all, and that the power to carry out such a program is implied by the majority of the Supreme Court, the extraordinary character of the act here challenged becomes still more apparent. It is conceded that if a loan program is necessary to effect the purpose of the statute, the Zoning Authority may be clothed with that power. But certainly it cannot by implication be clothed with a power which the statute itself could not confer upon the Authority, if it had attempted to do so by set and explicit words.

Before closing, we desire to touch upon one other point relied upon by respondents herein in opposition to the petition for certiorari:

#### 4. TIMELINESS OF THE FEDERAL QUESTION.

The claim that the Prorate Statute, as finally interpreted by the Supreme Court of California in this case, is repugnant to the Fourteenth Amendment was explicitly raised in petitioner's petition for a rehearing in the Supreme Court of California. That Court

denied the petition, and the Chief Justice of the Court gave a certificate to the effect that in denying the petition the Court considered and rejected the claim made under this federal question.

Concededly that certificate would not have been enough under the decisions of this Court if there had been nothing in the record from which this Court could infer that a federal question had been raised. The most recent decision is *Charleston Federal Savings Association v. Alderson*, 65 Supreme Court Reporter 624 (not yet officially reported). But in that case, as in the cases cited in Note 1 on page 627 of that report, except for the certificate there would have been no evidence before this Court that a federal question had been raised. This is not the case here, since the petition for a rehearing did explicitly raise the federal question and the certificate of the Chief Justice is conclusive evidence that, as required by the case of *Fullerton v. Texas*, 196 U. S. 192, 25 S. Ct. 221, 49 Law Ed. 443, the federal question was "expressly decided" when the petition for a rehearing was denied.

In any case, the petitioner respectfully points out that the certificate of the Chief Justice was added *ex abundanti cautela*. It is his contention that under existing cases, the wholly unanticipated decision of the State Supreme Court made the petition for a rehearing his first opportunity to raise the federal question. Until the decision of the California Supreme Court, the issue in the trial Court and the District Court of Appeal concerned itself wholly with the question of whether the pledge-agreement which

is here asserted to be invalid, was within the power of the Zoning Authority.

The trial Court and the District Court of Appeal sustained the petitioner's contention that the Zone had no such power under the statute. All the arguments in these Courts were directed to this question. The appeal by respondents here was therefore concerned merely with the interpretation of the statute. Under these circumstances, it can certainly be said that the decision of the Supreme Court, which first made the federal question in issue, was entirely unexpected and the raising of the federal question before that decision would have been "speculative". This brings the matter fully within the rule announced in *Ohio v. Akron Park Dist.*, 281 U. S. 74, 79, 50 S. Ct. 228, 74 Lawyers' Ed. 710 and *Saunders v. Shaw*, 244 U. S. 317, 37 S. Ct. 638, 61 Lawyers' Ed. 1163. Otherwise, to quote the latter case:

> "It would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." p. 320.)

It is clear that what has happened here is that, in the words of this Court in *American Surety Co. v. Baldwin*, 287 U. S. 156, at 164, the claim is based on "the unanticipated act of the State Supreme Court *in giving to the statute a new construction which threatened rights under the constitution*". (Emphasis supplied.)

Cf. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U. S. 673, 678 and
*Missouri v. Gehner*, 281 U. S. 313, 320.

### 5. CONCLUSION.

The petitioner wishes to repeat that he does not question the importance of the scheme of prorating crops nor the power of the State to make reasonable provision to protect agricultural markets from collapse. He does not question the right of the State to require the contribution by the petitioner of 20% of his raisin crop to the surplus pool, to be dealt with as the needs of the market required. He does not question the power of the State to take over this surplus, on the principle of eminent domain for just compensation and after due process is had to determine what compensation is just. But he earnestly contends that to take over the petitioner's share of this surplus, not as an exercise of the power of eminent domain and without compensation, and to do so for the benefit of private persons, cannot be sustained. In the words of Mr. Justice Holmes in the case cited in the petition for rehearing, page 26 (*Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 415):

> "That cannot be accomplished in this way under the Constitution of the United States."

It is because the petitioner feels that these considerations have not been fully presented to this Honorable Court, that he respectfully urges a rehearing of the petition for a writ of certiorari to the Supreme Court of California, to the end that a question of such fundamental importance, under the Constitution of the United States, a question never before passed on by this Court, and involving operations of the highest moment to the economy of the country, be given the

advantage of full argument and consideration by the highest Court of the country.

Dated, San Francisco, California,
May 1, 1945.

WALTER M. GLEASON,
MORGAN J. DOYLE,
*Attorneys for Petitioner.*

MAX RADIN,
*Of Counsel.*

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Berkeley, California,
May 1, 1945.

MAX RADIN,
*Of Counsel for Petitioner.*